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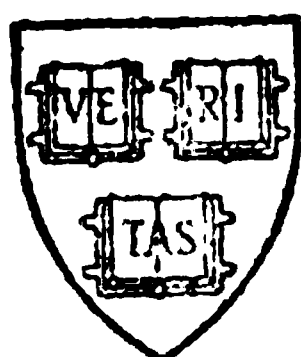
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY JAMES B. BLACK,
OFFICIAL REPORTER.

VOL. XXXIV.

CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1870.

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ADDITIONAL RULES
OF THE
SUPREME COURT OF INDIANA.

RULE 31*.—Whenever it shall be made to appear by the transcript or papers in the cause, or by affidavit filed, at any time before the submission of a cause, that the appellant or appellants is or are non-residents of the State, security for costs will be required of such appellant or appellants. The security shall be taken on the terms, in the form, and with the force provided for in section 302, p. 228, 2 G. & H. If the party or his attorney be not present in court, notice of the requirement will be given by the clerk to the party or his attorney; and if the security shall not be given within the time limited by the court, the appeal will be dismissed.

RULE 32†.—On appeal in a case of *habeas corpus*, either party may submit on motion at any time after the appeal is perfected, having given the opposite party or his attorney and any other person or persons having an adverse interest in the cause three days' previous notice of the intended motion to submit. The notice (a copy of which has been served) with the sheriff's return thereon, or, where the notice has been served by any other person than the sheriff, the notice with the acknowledgement of the service thereof or an affidavit stating the time and manner of service, shall be filed with the clerk of this court, before the motion to submit shall be made. Such cause may also be submitted by agreement or on call, as other cases.

*Adopted October 18th, 1871. †Adopted December 13th, 1871.

**For previous decisions of the Supreme Court of this State
overruled, criticised, &c., see INDEX, tit. CASES OVER-
RULED, &c.**

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1870, IN THE FIFTY-FIFTH
YEAR OF THE STATE,

THE UNION RAILROAD AND TRANSPORTATION Co. and An-
other v. YEAGER and Another.

CUSTOM.—*Certainty.*—Where, in attempting to show, in explanation of a contract of sale, a local commercial usage that cash sales were not made for cash in hand, but that payment might be made afterwards and the transaction still be regarded as a sale for cash, the evidence was uncertain as to the number of days given and whether the time given was computed from the date of the sale or the date of delivery, and showed that the usage of giving time ceased soon after the transaction in question;

Held, that the evidence was insufficient to prove the custom.

SALE.—*Delivery.—Bill of Lading.*—A. purchased a quantity of flour to be manufactured by a certain mill in St. Louis, Mo., and a parol agreement was made by A. and B. for the sale of the flour by the former to the latter for cash on delivery. Afterwards a freight company, which owned no means of transportation, gave B. an instrument styled a bill of lading, dated before the flour had been manufactured, by which said company acknowledged the receipt by it of the flour from B. and agreed to transport it to C. at Boston, Mass. A few days afterwards the servants of a transfer company, an organization engaged in carrying freights across the river at St. Louis, took the flour from said mill, conveyed it across the river, and put it in the custody of a railroad company for which said freight company acted as agent, receiving a certain percentage for all freights obtained for said railroad, said transfer company giving the superintendent of said mill dray tickets for the flour, and receiv-

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The Union R. R. and Transp'n Co. and Another v. Yeager and Another.

ing from said railroad company a bill of lading for the flour to be delivered to C. at Boston. The barrels had been marked at the mill with B.'s brand without the knowledge of A. Before the flour was taken from the mill B. drew on C. for a certain amount payable to the order of the former, chargeable to account of the flour, and for value sold the bill of exchange to a bank and transferred to said bank the instrument so given by said freight company to B. the bank having no notice of any claim on the flour in favor of A. Hearing of the embarrassment of B., who a few days afterwards became insolvent, A. inquired of the superintendent of the mill about the flour, received from him said dray tickets, and the day after the delivery of the flour to the railroad company went with said tickets and a bill for the flour to B. and requested payment, which not being made, A. told B. that he would keep the tickets and make other disposition of the flour, and went to the railroad company with said tickets and demanded a bill of lading, which was refused. No order, oral or written, was given by A. for the delivery of the flour from the mill, but the agents of the transfer company received their orders from the agent of said freight company, who received his authority from B.

Held, that A. was still the owner of the flour and entitled to its possession.

Held, also, that said instrument given by said freight company to B. could not be regarded as a bill of lading.

APPEAL from the Marion Circuit Court.

DOWNEY, J.—This action was brought by the appellees against the appellants for the recovery of the possession of four hundred barrels of flour, branded "196, Little Beauty XXX, Lamb & Quinlin sole agents for city trade, St. Louis, Mo.," of which it was alleged the defendants had the possession, without right, and which they unlawfully detained from the plaintiffs at the county of Marion.

On affidavit filed, alleging that the said property was unlawfully detained from the plaintiffs by the defendants, and containing the other statutory requisites, an order of seizure was issued, by virtue of which the property was taken by the sheriff from the possession of the defendants and delivered to the plaintiffs.

On her petition, the "Merchants National Bank of St. Louis, Missouri," became a party to the action, as a defendant.

The Union Railroad and Transportation Company answered: first, a general denial; second, that the flour was, on or about the 28th day of September, 1867, owned by Lamb & Quinlin, who then resided in St. Louis, Mo.; that they con-

The Union R. R. and Transp'n Co. and Another v. Yeager and Another.

signed and shipped, at about said date, said flour, over the line of this defendant, to C. Maynard & Son, Boston, they, the said Lamb & Quinlin, being the owners thereof, and took a bill of lading therefor, and drew a bill of exchange for four thousand four hundred dollars at sight, on said C. Maynard & Son, on account of said consignment, and that said Lamb & Quinlin sold said bill of exchange and bill of lading to the Merchants National Bank of St. Louis, Mo., while the flour was in transit and before it reached Indianapolis, and said bank became the *bona fide* owner of said bill of exchange and bill of lading and flour before it reached Indianapolis, and this defendant was the carrier of said flour, and said flour was replevied out of the possession of this defendant by said plaintiff when it had arrived at Indianapolis on its way to Boston; and that she was and is entitled to possession of said flour as carrier aforesaid for the owners thereof, the Merchants National Bank of St. Louis, Mo., and that said bill of exchange is wholly unpaid; wherefore, &c.

The Merchants National Bank of St. Louis, Mo., answered: first, a general denial; second, substantially the same facts set up in the second paragraph of the answer of the Railroad and Transportation Company, and claiming the ownership and right to the possession of the bill of lading, bill of exchange, and the flour.

Each of the defendants, that is to say, the Railroad and Transportation Company and the Merchants National Bank of St. Louis, afterwards filed a third paragraph of answer, alleging, that the flour was the property of the plaintiffs on the — day of September, 1867, and that they on that day sold the same to Lamb & Quinlin, merchants, of St. Louis, and they took possession of it by virtue of said sale, and delivered it to the carrier, took a bill of lading therefor, and sold said bill of lading and said flour to the said bank, who bought the same for a valuable consideration and without any knowledge of any claim the plaintiffs had on said flour, and that said bank is a *bona fide* purchaser of said flour, without notice; wherefore, &c.

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The plaintiffs replied to the second and third paragraphs of the answers of the Railroad and Transportation Company, and of the Merchants National Bank of St. Louis, separately; but we need not set them out separately. They are substantially the same, and are as follows: First. A general denial. Second. That on the — day of —, 1867, at the city of St. Louis, Mo., the plaintiffs bargained to said Lamb & Quinlin the said flour for — dollars per barrel, to be paid for, cash on delivery; that at the time of said sale, said flour was in the custody of one —, who held the same for plaintiffs, and that said Lamb & Quinlin fraudulently and without right, and without paying the agreed price therefore or any part thereof, and without the knowledge or consent of plaintiffs, took and obtained the custody of said flour and shipped the same to Boston; that plaintiffs recovered the possession of said flour by writ of replevin herein, while the same was in transit, as they lawfully might; and that said Lamb & Quinlin have never paid said agreed price or any part thereof.

Third. That on, &c., they bargained said flour to Lamb & Quinlin, for cash on delivery, and not on credit; that said flour was then in custody of a third person for plaintiffs' use; that Lamb & Quinlin, before any part of said flour had been delivered to them, and before they had paid any part of the price thereof, and while said flour was still in the custody of the plaintiffs, obtained from the said Union Railroad and Transportation Company the said bill of lading in said answer mentioned, without the delivery of any flour to said company or its agents; that said Lamb & Quinlin, afterwards, without the knowledge or consent of plaintiffs and without paying said agreed price, or any part of it, wrongfully took said flour into their possession and delivered the same to said company for shipment to Boston; that said Lamb & Quinlin being still in default in paying said agreed price or any part thereof, plaintiffs by the writ of replevin herein, took and recovered the possession of said flour, as they lawfully might do; wherefore, &c.

Fourth. That at the time of issuing the said bill of lading

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in the answer mentioned, said Lamb & Quinlin were not the owners of, or in the possession of, said flour, but the same was and still is the property of the plaintiffs.

Fifth. That at the time of issuing the said bill of lading, and at the time of the drawing of said bill of exchange in said answer mentioned, the said Lamb & Quinlin were not the owners or in possession of said flour, but the same then was and still is their property; wherefore, &c.

Sixth. That on, &c., the plaintiffs, being the owners of the flour, bargained and sold the same to the said Lamb & Quinlin for — dollars per barrel, which price was, by the terms of said sale, to be paid in cash on delivery, and the property in said flour was to remain in said plaintiffs until payment of the whole of said price; that said Lamb & Quinlin obtained the possession of said flour and failed and refused, and have ever since failed and refused, to pay any part of said price, and without right shipped said flour to the city of Boston for sale and became insolvent; and that because of the failure of said Lamb & Quinlin to perform said condition, plaintiffs repossessed themselves of said flour by the writ of replevin herein, as they lawfully might do; wherefore, &c.

The defendants demurred to the several paragraphs of the reply, except the first, which demurrers were all overruled, and an exception was entered. The action was dismissed as to Samuel F. Gray, who was an original defendant.

There was a trial by jury, and a verdict for the plaintiffs, that they were the owners and entitled to the possession of the four hundred barrels of flour in the complaint mentioned, and that the same were wrongfully detained by the defendants at said county of Marion; that said flour was of the value of five thousand dollars; and they assessed the plaintiffs' damages for the detention of said flour at one dollar. The jury also found specially, in answer to interrogatories, as follows:

"1. Did not the plaintiffs sell the four hundred barrels of flour in controversy to Lamb & Quinlin?" Answer, "Yes."

"2. Was not said flour manufactured at the Union Steam Mills, for Yeager & Co.?" Answer, "Yes."

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"3. Did not Yeager & Co., after they sold the flour to Lamb & Quinlin, notify Fruedenau, the superintendent of the Union Steam Mills, that he had sold said four hundred barrels of flour to Lamb & Quinlin?" Answer, "Yes."

"4. Did not said Fruedenau, previous to said notification from Yeager & Co., refuse to deliver said flour to the transfer company?" Answer, "Yes."

"5. Did not said Fruedenau, after he had received said notice from Yeager & Co., deliver said flour to said transfer company?" Answer, "Yes."

"6. Did not Lamb & Quinlin send said transfer company for said flour?" Answer, "No."

"7. Did not said Fruedenau know that said transfer company came for said flour on account of Lamb & Quinlin?" Answer, "No."

"8. Did not said Lamb & Quinlin obtain permission of and ship said flour in consequence of having purchased the same of plaintiffs?" Answer, "No."

"9. Did not Lamb & Quinlin ship said flour from St. Louis to Boston and obtain a bill of lading therefor from the carrier?" Answer, "Yes."

"10. Did not said flour reach Indianapolis upon its shipment by Lamb & Quinlin?" Answer, "Yes."

"11. Did not Lamb & Quinlin ship said flour to Maynard & Son, Boston, Massachusetts?" Answer, "Yes."

"12. Did not Lamb & Quinlin draw their bill of exchange for four thousand four hundred dollars, on the 28th of September, 1867, on said Maynard & Son, Boston, on account of said shipment?" Answer, "Yes."

"13. Did not said Lamb & Quinlin sell said bill of exchange and said bill of lading on the 28th of September, 1867, to the Merchants National Bank of St. Louis, Missouri, for a valuable consideration?" Answer, "Yes."

"14. Had said Merchants National Bank of St. Louis, Missouri, any notice when they bought said bill of exchange and bill of lading that the plaintiffs had any claim upon said flour?" Answer, "No."

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"15. What was the value of said flour at the time it was replevied by the plaintiffs?". Answer, "Five thousand dollars."

"16. Did not Yeager & Co. settle with the said Fruedenau by accepting the dray tickets from him for the said four hundred barrels of flour with a knowledge of the fact that said flour had been shipped?" Answer, "No."

There was a motion by the defendants for a new trial for the following reasons:

First. The court erred in suppressing and excluding from the jury all the evidence offered by the defendants in relation to the custom as to what were considered cash sales in St. Louis.

Second. The court erred in permitting plaintiffs to prove the course of trade in St. Louis, over the defendants' objection.

Third. The court erred in overruling the instructions asked for by the defendants to the jury, numbered 1, 2, and 3.

Fourth. The court erred to the defendants' prejudice in expounding the law to the jury, and in giving charges, 1, 2, 3, 4, 5, 6, 7, 8, and 9.

Fifth. The finding of the jury is contrary to the evidence.

Sixth. The answers of the jury to interrogatories numbered 6, 7, 8, and 16, are not supported by the evidence.

Seventh. The finding of the jury is contrary to the law and the evidence.

Eighth. The court erred in suppressing and excluding evidence offered to the jury by defendants.

Ninth. The court erred in permitting incompetent, irrelevant, illegal, and secondary evidence to be given to the jury by the plaintiffs over defendants' objection.

Tenth. The court erred to defendants' prejudice in amending the instructions asked by the defendants, before giving said instructions to the jury.

This motion was overruled, and final judgment was rendered for the plaintiffs. The defendant excepted, and by a bill of exceptions put the evidence in the record.

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There are twenty-two errors assigned, which, so far as they properly present any question, we will proceed to consider.

The first five relate to the action of the court in overruling the demurrers to the special paragraphs of the reply.

It is not necessary for us to decide these questions. The complaint alleges the plaintiffs' ownership of the property, and their right to the possession thereof. Under the general denial contained in the answer, the plaintiffs were bound to establish these facts as against every one else. Everything alleged by the defendants in the special paragraphs of their answers was admissible under the general denial; and everything alleged by the plaintiffs in their reply was admissible under the allegations in the complaint. Whatever facts the plaintiff must establish in order to make out his case, the defendant may controvert under the general denial in his answer. 2 G. & H. 113, sec. 91. Special paragraphs in an answer, or a reply, not by way of confession and avoidance, are unnecessary, and tend to needless prolixity and confusion. If we should examine these questions, and find that the special paragraphs of the reply were bad, we ought not to reverse the judgment for that reason; for it is evident that the parties litigated, and that the jury decided, the matters alleged in the complaint, which were put in issue by the general denial in the answer. See *Carter v. Thomas*, 3 Ind. 213.

The sixth, eighth, and twelfth alleged errors relate to suppressions of parts of the plaintiffs' depositions.

These portions of the evidence were offered for the purpose of proving the existence of a custom or usage in St. Louis, Mo., that cash sales were not made for cash in hand, but that the payment might be made some days afterwards, and the transaction still be regarded as a sale for cash. Quinlin in his deposition says, the usual time for collecting bills was, at the time of this transaction, *three days after* the property was *delivered*; but when his deposition was taken the the custom was to pay *on delivery*; that previous to the sale in question, within a year or two, the custom had not changed to his knowledge. Merret says, the custom was to pay in

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from three to five, ten, fifteen, twenty, and twenty-five days, and that all these are called cash sales. Robinson says, the custom was to present the bill and collect it about three days after the *date of the bill*, the bill being dated on the day of sale or delivery. The date of the delivery was the custom, because it was always delivered when sold, for there was no holding over. Any exceptions to that would be on special agreement. This was the custom on September 1st, 1867. It has been changed since, about the 1st of October, or sometime in October. It was after the 3d of October. The reason he knows it was, is because it was after the failure of Lamb & Quinlin. Resolutions to that effect have been adopted by the Chamber of Commerce.

It seems to us that if there was any such custom as contended for, this evidence did not tend to prove it. No two of the witnesses agree as to what it was. Its protean form is recognized at one time as giving three days, and again as giving twenty-five days; sometimes counting from the day of sale, and sometimes from the date of delivery. Then it is evanescent. It is in full force in one month, and gone the next. Certainty is one of the requisites of a good custom. There was no error in this action of the court. See, as to custom, *Harper v. Pound*, 10 Ind. 32; *Cox v. O'Riley*, 4 Ind. 368; *Carlisle v. Wallace*, 12 Ind. 252.

The seventh, ninth, tenth, eleventh, fourteenth, fifteenth, and sixteenth assignments of error, relate to the refusal of the court to suppress parts of the plaintiffs' depositions. We see no error in this ruling. And, aside from these parts of the evidence, the case was made out.

The seventeenth alleged error relates to the improper admission in evidence of the statute of frauds of Missouri.

This, if an error, was harmless, as the case does not turn on the question whether the contract was or was not within the statute of frauds. The leading facts in the case are, that Yeager & Co. had purchased one thousand barrels of flour, to be manufactured at the Union Steam Mills in St. Louis. They had received all of it except four hundred barrels. Before

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this was manufactured, a parol agreement was made by Yeager & Co. to sell it to Lamb & Quinlin, of St. Louis. The South-Western Freight and Cotton Press Company, an organization owning no railroad of its own, or other means of transportation, through its officers or agents, gave to Lamb & Quinlin what they style a bill of lading, by which they acknowledged the receipt by said company of the flour from Lamb & Quinlin, and agreed to transport it to Maynard & Son, of Boston, Mass. This paper bears date Sept. 26th, 1867, at which time none of the four hundred barrels of flour had been manufactured. By some means, the brand of Lamb & Quinlin, "Little Beauty," got to the mill, and as the flour was made, was put on the barrels; but it does not appear that this was known to Yeager & Co. The transfer company is an organization engaged in transferring freight across the Mississippi river to and from St. Louis. The servants of this company took the flour from the Union Steam Mills when it was manufactured and branded, conveyed it to the opposite side of the river and put it in the custody of the railroad company, giving dray tickets for it to the superintendent of the mill. One hundred barrels were thus transferred on the 28th day of September, 1867, manufactured from seven o'clock A. M. to three o'clock P. M., on that day; one hundred and fourteen barrels were delivered on the 30th of the same month, about the same hour; and the residue on the 1st day of October, 1867. Yeager had told the superintendent of the mill that he had sold the four hundred barrels of flour to Lamb & Quinlin. No written order was produced by or from any one to the superintendent of the mill to deliver the flour to the transfer company.

On the 28th day of September, 1867, Lamb & Quinlin drew on Maynard & Son, payable to their own order, for four thousand four hundred dollars, chargeable to account of the four hundred barrels of flour, and sold the same to the Merchants National Bank of St. Louis, and transferred to the bank the instrument given to them on the 26th day of September, 1867, by the South-Western Freight and Cotton Press

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Co., as security. This company acted as agent for the railroad company, and received a percentage on the amounts derived from conveying the freight which it obtained for the railroad. On the 1st day of October, 1867, the South-Western Freight and Cotton Press Co. obtained a bill of lading from the railroad company for the same flour, to be delivered to the same consignee mentioned in the instrument which they had given to Lamb & Quinlin.

Yeager & Co., hearing of the embarrassment of Lamb & Quinlin, inquired of the superintendent of the mill about the flour, got the dray tickets of him, and went with them and a bill for the flour, on the 2d of October, 1867, to Lamb & Quinlin, and requested payment for the flour, which not being made, they told them that they would keep the tickets and make some other disposition of the flour. Lamb & Quinlin became insolvent about the 1st, 2d, or 3d of October, 1867. Yeager & Co. went to the railroad company with the dray tickets of the transfer company and demanded a bill of lading for the flour, which was refused, the agent of the company saying that they had already given a bill of lading to another party. No order, oral or written, from Yeager & Co. for the delivery of the flour from the mill is shown. On the contrary, it is shown that the agents of the transfer company got their orders from an agent of the South-Western Freight and Cotton Press Co., and he got his authority from Lamb & Quinlin.

The nineteenth alleged error relates to and calls in question the correctness of the instructions given to the jury. They are as follows:

1. If a bargain of sale of goods is made, to be paid for, cash on delivery, and the buyer under such bargain gets possession of the same without payment and without the knowledge or consent of the seller, such possession is without right and without even color of right; and no act of the party so coming into possession of such property can vest the property or right of possession in any other person than the seller.

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2. The consent of both parties is necessary to constitute a delivery—the seller's consent to part with the possession, and the buyer's to receive it. The unauthorized act of the custodian of the property of another in parting with the possession cannot bind the owner, unless such act is ratified by the owner; and the ratification of such act will be the same as original authority: but an act cannot be ratified, only on full knowledge of all the facts of the case; and when a ratification of an unauthorized act is relied on, the party relying on it is bound to show by a preponderance of evidence that the other in ratifying the unauthorized acts had full knowledge of all the material facts.

3. In such transactions as in this case have been brought before the jury in evidence, it is proper to consider the usual course of business where they occurred; if it was the usual course of business for the delivery of property subject to shipment to distant places to be by delivery of receipts for the same by intermediate and local carriers, then delivery and acceptance of such receipts would be such delivery as the law would recognize; and if a party making sale to a second party delivered the property sold to local carriers unconsigned, and it was in usual course of business for such carrier to deliver to other carriers for further transportation, who held the property until consigned by the holders of receipts last named (of local carriers), the acceptance of such receipts would be an acceptance of the property by the second party: but the delivery by the local carrier to some third person, or to some other carrier to carry on account of some third person who had no right to the property, would not divest the owner of the right of the property, and he would have the right to possession wherever he could find it.

4. If you believe, from the evidence, the Union Steam Mills Company sold the flour in controversy to plaintiffs, and the mill company delivered it to the local carriers, the transfer company, unconsigned, and it was the usual course of business for such local carrier to deliver to other carriers for further transportation, who, in the usual course of business,

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would hold the flour until consigned by the holder of the transfer company's receipts, then the acceptance of such receipts by the plaintiffs would be an acceptance of the flour from the mill company. But if the flour was delivered by the transfer company to some other carrier, without the consent of plaintiffs, to be carried on account of Lamb & Quinlin, and they had no right to the possession of the same until payment of the price of the flour or a waiver by plaintiffs of the cash element of the sale, such act would not divest the plaintiffs of the right of possession, and they would have the right of possession wherever they could find the flour. And no act of Lamb & Quinlin, in such event, could divest the right of plaintiffs.

5. A bill of lading, to be of any effect, must be given upon possession of the property by the party giving the bill, at the time the bill is given; but the bill may become effective by the after-acquired possession by the carriers of the property named in it: such possession must be a valid possession with the consent or acquiescence of the owner of the property; but possession acquired without that is wrongful, and the transfer of the bill of lading to an innocent purchaser would not affect the right of the real owner, unless he had voluntarily parted with its possession to the person or the agent of the person making the shipment.

6. If, then, you believe from the evidence that a bargain of sale was made by the plaintiffs to Lamb & Quinlin of the flour in controversy, to be paid for, cash on delivery, and that Lamb & Quinlin got possession of the same without the consent or knowledge of the plaintiffs, and without paying the price for the same, then Lamb & Quinlin acquired no property in the flour, and could transfer none; and in that event, unless you believe from the evidence that the plaintiffs ratified the acts of the Union Steam Mills Co., in delivering the flour, to the transfer company, and also the further acts of the transfer company in delivering the same to Lamb & Quinlin, or upon their order, then your verdict should be for the plaintiffs.

7. But if you believe, from the evidence, that plaintiffs

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consented to the delivery of the flour to Lamb & Quinlin or their agents, although such consent was or might have been procured by fraudulent representations or promises; and by means of a bill of lading the property was then transferred to an innocent purchaser, such innocent purchaser would hold the property free from any claim of the owners; but to make the title of such purchaser good, however innocent he might be, the possession must have been procured by the consent or acquiescence of the owners, or the owners, with full knowledge of all the facts, must have ratified the acts by which the possession was acquired.

8. If the jury believe from the evidence that, at the time, by the usage of trade in St. Louis, the dray tickets or receipts of the transfer company were regarded and treated as a badge of possession and ownership in the person who held them, and that a delivery of these dray or transfer tickets was, according to such usage of trade, the invariable mode of delivering property intended for shipment by the seller to the buyer, and that in this case the dray or transfer tickets were retained by plaintiffs and not delivered, then the retention of such tickets is a fact tending to prove that the delivery was not complete.

9. If the jury believe, from the evidence, that Lamb & Quinlin purchased from the plaintiffs the flour in controversy, and under color of such purchase, with the knowledge and consent of plaintiffs, Lamb & Quinlin obtained possession of the flour, and shipped the same to Maynard & Son, Boston, and obtained a bill of lading from the carriers for the same, and then drew a bill of exchange on Maynard & Son, at Boston, for the price or value, or a part of the price or value of the same, and then sold said bill of exchange and bill of lading to the Merchants National Bank of St. Louis, for a valuable consideration, and said bank bought the bill of exchange and bill of lading without knowledge of the claim of plaintiffs, then the bank became a purchaser in good faith, and in such case you should find for the defendants.

As we have already seen, the questions in the case were

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the plaintiffs' ownership and right to the possession of the property. These were denied, and hence the plaintiffs were bound to prove them. They did this by showing the ownership of the flour while at the mill. The mere agreement on their part to sell the flour could not pass the title and give the right to Lamb & Quinlin to go and take it without their order, and without paying for it, unless payment at or before the delivery was waived, in which case delivery by them or by their order would pass the title without payment. Hence the question whether or not Yeager & Co. had thus consented to the delivery of the flour was the principal question of fact in the case. So far as the instructions relate to this, we can see no objection to them. While there was little or no evidence on the point, we think the law is correctly stated with reference to the ratification of an unauthorized delivery.

With reference to the bill of lading, as it is called, we think the instructions were more favorable to the defendants than they should have been. There are various definitions of the term "bill of lading," agreeing in substance. It is a memorandum or acknowledgment in writing, signed by the captain or master of a ship or other vessel, that he has received in good order, on board of his ship or vessel, therein named, at the place therein mentioned, certain goods therein specified, which he promises to deliver in like good order (the danger of the seas excepted) at the place therein appointed for the delivery of the same, to the consignee therein named, or to his assigns, he or they paying freight for the same. Bouvier's Law Dictionary.

Though applicable originally to carriers by sea, it seems now to be agreed, and we see no reason to the contrary, that a similar instrument issued by a carrier by land will have the same force and effect in law. Bouvier's Law Dic.; 1 Parsons on Shipping and Admiralty, 134.

The indorsement of a bill of lading by the owner of the goods passes the property in the goods to the indorsee. *Law v. Hatcher*, 4 Blackf. 364; Addison on Con., 205.

In this case, the goods in question, the flour, was not even

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manufactured at the time of the making of the instrument characterized as a bill of lading, and was at no time in the possession, actually or constructively, of the South-Western Freight and Cotton Press Company, or its agents, for the purpose of being carried by that company. It had no means of carrying it, and never intended to do so. Whatever other properties the instrument executed by that company may have had, it cannot be regarded as a bill of lading. To hold it to be valid as such, would be to hold that every agent and every runner of a vessel, railroad, or other common carrier, may issue paper, in his own name, to which the law would attach the legal characteristics of bills of lading.

The transfer of such instrument by Lamb & Quinlin to the Merchants National Bank of St. Louis, could not, and did not, confer upon the bank the ownership of the goods in question, for the reasons given, even if Lamb & Quinlin had a property therein. So far, then, as the circuit court authorized the jury to consider the instrument in question as a bill of lading, the transfer of which would confer upon the bank a property in the goods, the instructions were more favorable to the defendants than they should have been.

The instructions which the court was requested by the defendants to give, and which it refused to give, are as follows :

1. If the jury find, from the evidence, that Lamb & Quinlin purchased from Yeager & Co. the flour in controversy, and under color of said contract Lamb & Quinlin obtained possession of said flour at St. Louis, and shipped the same to Maynard & Son, Boston, and obtained a bill of lading from the carriers for the same, and then drew a bill of exchange for the price of said flour on Maynard & Son, at Boston, and then sold said bill of exchange and bill of lading to the Merchants National Bank of St. Louis, for a valuable consideration, and said bank bought said bill of exchange and bill of lading without any knowledge of the claim of plaintiffs, then said bank became a purchaser in good faith, and you must find for the defendant, said Merchants National Bank of St. Louis.

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2. If the jury find for the defendants, then they must find the value of the flour at the time it was replevied by plaintiffs, and also the damages defendants have sustained for the detention thereof since it was replevied; and the criterion of damages would be interest on the value found.

3. If the jury believe, from the evidence, that after the flour in controversy was delivered to the transfer company by Fruedenau, at the Union Steam Mills, and Lamb & Quinlin had shipped the flour to Boston, Yeager & Co. accepted said delivery by Fruedenau in fulfilment of his contract with Yeager & Co., such acceptance was a delivery of the flour to Lamb & Quinlin, and the title passed to Lamb & Quinlin and from them to the bank.

The first of these charges was too indefinite to go to the jury. What was meant by the words, "under color of said contract?" If it meant that because Lamb & Quinlin had contracted for the flour, that they, or any one for them, could send and take it from the mill without the authority of the plaintiffs and without having paid for it, then it was rightly refused, for they could not acquire any right to the flour in such way. *Robinson v. Marney*, 5 Blackf. 329; *Bradley v. Michael*, 1 Ind. 551.

As the second charge asked and refused related only to the form of the verdict of the jury in the event they should find for the defendants, and as they did not find for them, it is evident that no harm was done in refusing it.

Nor do we think the third instruction asked and refused should have been given. Fruedenau was the superintendent of the mill. He asked for an order when the servants of the transfer company came for the flour. They had none. He delivered the flour, taking the dray tickets from the transfer company, marked "on account of Yeager & Co., or left blank for his own account." He delivered these tickets to Yeager & Co.; but says expressly, "I had no authority from Yeager & Co. to deliver flour to Lamb & Quinlin, and delivered none to them." It is the acceptance of these "tickets" by Yeager

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& Co. which it is insisted had the effect to work a delivery of the flour to Lamb & Quinlin.

We think there was no reason for granting a new trial. The flour in question was the property of Yeager & Co. while at the mill, and it is not shown that it was ever transferred by their consent to Lamb & Quinlin. The bank will have to look to some other source than the flour in question, if there be any other within its reach, for reimbursement.

The judgment is affirmed, with costs.

F. Rand and *R. H. Hall*, for appellants.

G. P. Strong, *A. G. Porter*, *B. Harrison*, and *W. P. Fishback*, for appellees.

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PLEADING.—*Fraud*.—Fraud cannot be pleaded without stating the facts constituting it.

PRINCIPAL AND SURETY.—Where one is about to take a note, with surety, from a person whom he knows to be insolvent, the mere fact that the creditor does not, voluntarily and without solicitation, announce to the proposed surety the insolvency of the principal, will not release the surety.

SAME.—*Misapplication of Promissory Note*.—Where one is induced to sign a note as surety, by the representation, made to him for the purpose of so inducing him by the payee, that the note is to be used in payment for goods to be furnished by the payee to the maker, and the note is used to pay a pre-existing debt of the maker to the payee, the person so signing is not bound as surety.

SAME.—*Pleading.—Evidence*.—Suit on a promissory note by the payee. Answer by surety, that prior to the execution of the note, the maker was the proprietor of a retail furniture store, which, including the stock, had been sold to him by this defendant, to whom the maker was indebted therefor in a certain sum, and that it had been agreed between said maker and this defendant that the latter should hold a lien on said stock and all additions thereto, to secure said indebtedness, and that said maker was to execute a mortgage on the same for that purpose; that the payee, who was a wholesale furniture dealer in the same place, knew of said indebtedness, and, intending to deceive this defendant and induce him to sign the note as surety, represented to him that said maker was doing a good business and getting along well, but needed more stock, and that

the payee would furnish him some more goods, if this defendant would become surety on his note for the same ; that this defendant, relying on said statements, and in consideration of the fact that said goods were to be added to the stock, thus augmenting his security, became surety on said note, believing at the time that the note was given for goods furnished by the payee to the maker as aforesaid, whereas the payee did not furnish the maker any goods, but the whole consideration of the note on the part of the maker was a prior indebtedness of the maker to the payee, of which fact the surety was at the time ignorant ; that the maker was at the time insolvent, and was not prospering in his business, as the payee well knew ; that the maker had never paid his indebtedness to the surety, who never received any consideration for his signature to the note.

Held, also, that evidence as to the insolvency of the maker, at the time of the interview between the payee and the surety and the execution of the note, was not admissible under this answer.

Held, also, that if at the time the surety signed the note he was told by the maker that it was to be used in payment of a prior debt of the maker to the payee, and if it was so used, then the surety would be liable, notwithstanding the payee had represented to the surety that it was to be used in payment for goods, as alleged in said answer.

WORDEN, J.—Suit on the following note:

“Sixty days after date, we promise to pay to the order of Greve, Buhrlage & Co. four hundred and eighteen dollars, without defalcation, value received; negotiable and payable at the office of the Western Insurance Company in Louisville, Ky.

JAMES G. MCNETT,

JAMES G. McNETT,
JASON HAM, security."

The defendant Ham pleaded: First. Payment. Second. Want of consideration. Third. That his signature to the note was obtained by the fraud of the plaintiffs, without showing the circumstances. Fourth. That prior to the execution of the note McNett was the proprietor of a retail furniture store in Louisville, Ky., which, including the stock, had been

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sold to him by said Ham, for which McNett owed him the sum of twenty-five hundred dollars; and that it had been agreed between said McNett and Ham that the latter should hold a lien on said stock and all additions thereto to secure said indebtedness, and that McNett was to execute a mortgage on the same for that purpose; that the plaintiffs, who were wholesale furniture dealers in the same place, knew of the indebtedness of McNett to the defendant, and, intending to deceive the defendant and induce him to sign the note as security, represented to him that McNett was doing a good business and was getting along well, but that he needed more stock, and that the plaintiffs would furnish him some more goods if the defendant would become security on his note for the same; that the defendant, relying upon said statements, and in consideration of the fact that the goods so to be furnished were to be added to the stock, thus augmenting his security, agreed that he would become surety on such note, and therefore he placed his name upon said note as such surety, believing at the time that the note was given for the price of goods furnished by the plaintiffs to McNett as aforesaid; whereas the plaintiffs did not furnish to McNett any goods, but the whole consideration of the note on the part of McNett was a prior indebtedness of McNett to the plaintiffs on a note which had been protested for non-payment, of which fact the defendant was at the time ignorant; and McNett was at the time insolvent, and was not prospering in his business, as the plaintiffs then well knew. Said McNett has never paid his indebtedness to the defendant, and defendant never received any consideration for his signature to the note.

Fifth. That he signed the note merely as surety to said McNett, who was the principal therein, and at the time of the execution of said note the said McNett was wholly insolvent, which fact was well known to the plaintiffs, but was not known to the defendant; and the said plaintiffs then and there fraudulently concealed the fact of said insolvency from the defendant, and induced him to sign the said note, and he

has never received any consideration whatever for such signature.

A demurrer was sustained to the third and fifth paragraphs of the answer, and exceptions were taken. Reply in denial of the first, second, and fourth paragraphs; also a reply denying all fraud charged in the fourth.

Trial of the issues by a jury; verdict and judgment for the plaintiffs, a new trial being asked for and denied.

Error is assigned upon the ruling on the demurrers. The ruling on the demurrer to the third paragraph of the answer was very clearly right. That paragraph set up fraud in obtaining the defendant's signature to the note, without stating in any manner in what the fraud consisted. That such pleading is bad, has been decided so often by this court, that to cite the cases would extend this opinion into needless prolixity.

The fifth paragraph raises a more debatable question, but we are of opinion that that also was bad, and the demurrer to it correctly sustained. The substance of that paragraph is, that at the time the note was given, McNett was insolvent, which fact was unknown to the defendant, but was known by the plaintiffs, and by them concealed from the defendant. The pleading says it was *fraudulently* concealed, but it states no fact of which fraud is predicable. It does not appear that the plaintiffs knew that the defendant was ignorant of McNett's insolvency; and unless the simple fact that the plaintiffs knew he was insolvent made it their duty to communicate that fact to the defendant, they had the right to remain silent; and the charge of fraudulent concealment, without any statement of circumstances that made it their duty to disclose the fact to the defendant, does not add anything to the statement.

We think the real question presented by this paragraph may be stated thus: Is it the duty of a person about to take a note, with surety, from one whom he knows to be insolvent, to disclose the fact of such insolvency to the proposed surety? and in default of such disclosure, will the contract of the surety be void? We are of opinion that this

question must be answered in the negative. The creditor in such case may suppose that the proposed surety is as well advised of the pecuniary condition of the principal as he is himself, and knowing his condition, is willing to help him by becoming his surety. Undoubtedly, if the proposed surety should apply to the creditor for information as to the responsibility or solvency of the principal, it would be the duty of the creditor to give him all the information he possessed on that subject, and if he should withhold any fact within his knowledge, material to the risk to be assumed by the surety, the latter would not be bound. But the creditor is not bound in such case to volunteer his information unsolicited and uncalled for. It is said, that "any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract." 1 Story Eq. § 324. The fact of the insolvency of the principal cannot be said to be *concealed* by the creditor, unless he is called upon by the surety, or by the circumstances of the transaction, to make the disclosure, and he fails to do so. His silence is no fraud unless the proposed surety or the nature of the transaction calls upon him to speak. The author just quoted, in § 325 *a*, says, "It is now regarded as settled that there must be something which amounts to fraud, to enable the surety to say that he is released from his contract on account of misrepresentation or concealment."

Circumstances might exist that would make it the duty of the creditor to disclose his knowledge of the principal's pecuniary condition, though not called upon to do so by the surety; but no such circumstances are alleged in the paragraph in question.

We pass to other questions arising in the record.

On the trial of the cause, while the defendant Ham was on the stand as a witness in his own behalf, his counsel offered to prove by him, "that prior to the execution of the note in

suit, and prior to the interview between him and the plaintiff Greve, as related by him, the defendant McNett was indebted to him in the sum of twenty-five hundred dollars, and had agreed, after the creation of said debt, to execute to him as security therefor, a mortgage of all his stock of furniture then on hands, and of such additions thereto as should from time to time be made; which agreement was in force, and said indebtedness unpaid, at the time of said interview and at the time of the signing of said note," but the court, on objection being made, excluded the evidence as to the agreement to execute a mortgage, and admitted it as to the indebtedness.

On the further trial of the cause, the defendant Ham propounded to McNett, who was on the stand testifying as a witness, the following question: "At the time of the interview between Ham and Greve, and at the time of the execution of this note, what was your condition as to solvency or insolvency?" But the court sustained an objection to the question. The defendant further offered to prove by McNett, that at the time of the execution of the note, he was insolvent, and that his whole stock in trade was taken, within six weeks thereafter, on attachment, for debts created before the execution of the note, to more than the value of the whole stock; but objection being made to the evidence, it was excluded.

The court gave to the jury the following charges, to which the defendant excepted.

"1. This suit is brought on a note signed by Jason Ham as security for James G. McNett. Ham is liable on the note, and a verdict should be returned against him, unless he shows, by a fair preponderance of evidence, that he was induced to sign the same by the false and fraudulent representations of the plaintiffs."

"2. If the jury believe from the evidence that the plaintiffs, in a conversation with Ham, prior to the execution of the note sued on, said to Ham that McNett was doing a good business and was getting along well, but that he needed

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some more stock, and that they would furnish him some more goods if the defendant would become security on McNett's note for the same; and if the jury believe that said Ham, relying on said representations, afterwards signed the note sued on; and if the jury further believe from the evidence that the plaintiffs afterwards refused to let McNett have furniture on said note, but kept the note and applied it in payment of a pre-existent debt due from McNett to the plaintiffs, then the jury should return a verdict in favor of the defendant."

"3. If the jury believe, from the evidence, that McNett told Ham at the time he signed the note sued on, that the same was to be used in payment of a debt that McNett then owed the plaintiffs, then Ham is liable, though the jury believe, from the evidence, that the plaintiffs made the representations alleged, if they also believe from the evidence that said note was received by the plaintiffs in satisfaction of a pre-existing debt of McNett."

The defendant asked, but the court refused, the following instructions:

"1. If the plaintiffs or either of them, before the execution of the note, were notified that McNett was indebted to Ham, and that they or either of them, with intent to induce Ham to sign this note from McNett to them, represented to Ham that McNett was doing well in business, but that he needed more stock to enable him to carry on business successfully, and that they would furnish more stock if Ham would go on his paper as security, and if Ham then agreed to sign a note as security for the stock so to be furnished, and if Ham did shortly afterwards, relying upon said representations, sign the note sued on as security for McNett; and if the jury believe from the evidence that Ham was justified from said representations in believing that he was signing said note as security for goods furnished to McNett, and if he had no knowledge that said note was given for a pre-existing debt of McNett, and if, in fact, no goods were so furnished to McNett by plaintiffs, but that the only consideration of said

note was a pre-existing debt of McNett, then and in that case, the plaintiffs cannot recover against Ham on said note."

"2. If before the signing of the note by Ham, the plaintiffs, with intent to induce him to sign it, represented to him that McNett was solvent, and was doing well in business, and if Ham was ignorant of the fact, and relied upon such representations, and signed the note, and if, in fact, McNett was at the time insolvent and in failing circumstances, and was known to be so by the plaintiffs, then the plaintiffs could not recover, as against Ham, on said note."

Whether or not error was committed in the exclusion of the evidence offered, or in giving or refusing the charges given and refused, must depend upon the legal effect of the fourth paragraph of the answer. That paragraph states, as we think, two grounds, and only two, which, if established, entitle the defendant to be discharged. First. It is alleged that the plaintiffs, "intending to deceive the defendant, and induce him to sign the note as surety, represented to him that McNett was *doing a good business, and getting along well,*" &c.; whereas he was at the time *not prospering in his business*, as the plaintiffs well knew. Second. That the defendant signed the note upon the understanding that it was for goods to be furnished by the plaintiffs to McNett, but that it was applied to the payment of a prior debt which McNett owed the plaintiffs. These are the substantial allegations of the pleading, and the residue might have been stricken out as surplusage.

The statements of the indebtedness of McNett to the defendant Ham, and the agreement between them as to the lien and the execution of a mortgage to secure the indebtedness, do not add anything to the legal effect of the other matters stated. They may be good reasons why Ham should feel justified in claiming the right of being discharged on the ground of the alleged misapplication of the note; but that right he would have without any such indebtedness or agreement. "If, in the contract between the principal debtor and the creditor, there is a departure from that which the surety

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stipulated for when he entered into the obligation, the surety will be released." White & T. Lead. Cas. 533 (3d Am. ed.), and authorities there cited. Where a person gave a promissory note as a surety, upon an agreement that the amount should be advanced to the principal debtor by *draft at three months date*, and the creditor, without the concurrence of the surety, *paid the amount at once*, instead of giving the draft, it was held that the agreement had been varied, and that the surety was discharged. *Id.* 534. So in the case of *Stone v. Compton*, 5 Bing. N. C. 142, the recital in the mortgage led the surety to suppose that the whole sum secured was advanced to the principal, and he was not informed to the contrary, and a part only was thus advanced, and the residue applied to a pre-existing debt; it was held that the surety was discharged. There can be no doubt that the alleged misapplication of the note, if established, would discharge Ham, without any reference to the indebtedness of McNett to him, or any agreement between them as to security therefor; and such seems to have been the view of counsel below, inasmuch as a special replication was filed to the fourth paragraph of the answer, denying simply the fraud charged therein, which was unchallenged by demurrer or otherwise.

If we are right in these views, it follows that the court committed no error in excluding the testimony as to the agreement to execute the mortgage, because it was a matter not material to the issues, and not necessary to be proved in order to make out the defense. Where immaterial matter is alleged in a pleading, with that which is material, it does not follow that, because it is alleged, it must, or can, be proved.

We are of opinion, also, that no error was committed by the court in excluding the evidence of the insolvency of McNett at the time of the execution of the note, &c., as offered. This was rightly excluded, because the allegations of the answer are not broad enough to admit it. His solvency or insolvency had nothing to do with the case, unless the plaintiffs made some representations to Ham on that subject.

It is alleged on this subject, in the answer, that the plain-

tiffs represented to Ham that "McNett was doing a good business and getting along well." This is not equivalent to a representation that he was solvent. We conceive it to be quite possible, and indeed quite common, for men who are utterly insolvent, and unable to pay a tithe of their debts, to be doing a good business, and to be getting along well. By doing a good business and getting along well, insolvent men are sometimes enabled to make themselves solvent, and to pay all their debts. The representation had reference to the business of McNett and his success at the time, and nothing more. The answer negatives this representation by saying that McNett was not prospering in his business; it alleges also that he was insolvent, but in the absence of any representation on that subject, the allegation is totally immaterial, and the proof offered to sustain it was correctly rejected.

We come to the instructions. Objection is made to the first given by the court, because it is too narrow and does not embrace the whole subject in issue. Standing alone, it might be objectionable, but in connection with the second, the objection loses its force. The two together embrace the substance of the whole case, and put it fully and fairly before the jury. The case, moreover, went to the jury on the theory that proof of the facts sought to be established by the rejected evidence was not necessary to the defense.

The third charge given we think was right. If Ham was told by McNett at the time of the execution of the note that it was to be used in payment of a pre-existing debt of McNett to the plaintiffs, he had no right to suppose that it was executed for the purpose of securing the plaintiffs for goods to be by them, in the future, furnished to McNett. Upon being thus told the object and purpose of the note by him whose surety Ham was about to become, he might well suppose that any previous arrangement for furnishing goods and securing the pay therefor had been abandoned, or if not abandoned, that the note in question was not executed in pursuance thereof.

As to the charges asked by the defendant and refused, we

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may observe that the first was in substance embraced in the second charge given, and therefore no error was committed in refusing it.

The second change asked and refused was correctly refused, for the same reason that evidence of the insolvency of McNett was properly rejected.

By the charge asked, the defendant sought to avail himself of a supposed representation by the plaintiffs of the solvency of McNett, no such representations being alleged, as we have seen, in the pleading.

What we have said disposes of all the questions raised in the cause. We find no error in the record.

The judgment below is affirmed, with costs.

C. H. Burchenal, for appellant.

J. B. & J. F. Julian, for appellees.

 HEAVENRIDGE v. MONDY.

PRACTICE.—*Demurrer*.—A demurrer to an entire pleading should be overruled if such pleading contain any good paragraph.

PARTIES.—*Trustee of Express Trust*.—Suit by A. on a promissory note made payable to A. (for B.) or order.

Held, that A. was the trustee of an express trust within the statutory definition, and the action was properly brought in his name.

SUPREME COURT.—*Rehearing*.—It is the settled practice of the Supreme Court not to consider on a petition for a rehearing a question not presented and considered on the original hearing of the cause.

DEMURRER.—*Contract Made on Sunday*.—In a suit on a promissory note which appears on its face to have been executed on Sunday, no question as to its invalidity by reason of its execution on that day can be raised by demurrer to the complaint.

APPEAL from the Hendricks Circuit Court.

BUSKIRK, J.—This was a suit by the appellee against the appellant upon a note in these words:

“\$220.00.

STILESVILLE, Sept. 1st, 1867.

“Six months after date, I promise to pay A. Mondy (for

34	28
138	582

34	28
144	188

34	28
148	116

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Wm. Mondy) or order, two hundred and twenty dollars, with interest at ten per centum per annum. Value received, without any relief whatever from valuation or appraisement laws.

A. HEAVENRIDGE."

The complaint contained two paragraphs. The first was in the ordinary form upon the above note. The second alleged that on the 1st day of Sept., 1867, one William Mondy being then and there indebted to the plaintiff in the sum of two hundred and twenty dollars, the said defendant, Allen Heavenridge, having then and there large business transactions with the said William Mondy, did, at the date last aforesaid, by agreement of said plaintiff, said defendant, and said William Mondy, undertake and agree to and with the said plaintiff to pay him, said plaintiff, the said sum of two hundred and twenty dollars, the debt so owing as aforesaid by the said William Mondy to the said plaintiff; whereupon said contract and promise were reduced to writing; and the note above described is then set out; that the note with the interest remain due and wholly unpaid; and that upon the execution of the said note, the plaintiff released the debt owing to him by the said William Mondy.

The appellant demurred to the complaint, and assigned for causes, that the complaint did not state facts sufficient to constitute a cause of action, and that there was a defect of parties plaintiffs, in this, that the note and facts stated showed that William Mondy was the real party in interest, and that the action should have been prosecuted in his name, and not in the name of Alfred Mondy, the plaintiff.

The court sustained the demurrer to the first, and overruled it to the second paragraph of the complaint, and proper exceptions were taken.

The first error assigned consists in overruling the demurrer to the second paragraph of the complaint. The complaint was in two paragraphs. The demurrer was to the complaint generally, and not separately to each paragraph. The rule is well settled, that where the pleading is in several paragraphs, and the demurrer is to the pleading generally, the

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demurrer should be overruled if there is one good paragraph. If either of the paragraphs of the complaint contained a good cause of action, the demurrer was properly overruled. The ruling of the court upon the demurrer presents for our consideration and decision the question of whether the action was properly brought in the name of Alfred Mondy, to whom the note was payable. It is earnestly maintained in the brief of the appellant that, as the note upon its face declares that it was payable to Alfred Mondy (for Wm. Mondy), William Mondy was the real party in interest, and that under our code of practice the action should have been prosecuted in the name of William Mondy. The third and fourth sections of article two of our code read as follows:

“SEC. 3. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.”

“SEC. 4. An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. *A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.* It shall not be necessary to make an idiot or lunatic a joint party with his guardian or committee, except as may be required by statute.” 2 G. & H. 34, 35, 36, and 37.

The above sections of our code were copied from the New York code, except the definition of “a trustee of an express trust.” This was left to construction. In the case of *Grinnell v. Schmidt*, 2 Sandf. 706, MASON, J., after quoting the above sections down to the definition of “a trustee of an express trust,” says: “It has been generally supposed that the words ‘express trust,’ in this section, refer to trusts of land authorized by the revised statutes, and which are in the statutes

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themselves termed 'express trusts,' and to them alone. It is not necessary, however, to give to the words this restricted meaning. They are capable of a more extensive signification, so as to include all contracts in which one person acts in trust for or in behalf of another."

The meaning of the words "a trustee of an express trust," as used in section four above quoted, was not left to the interpretation and construction of the courts, but their signification and construction were so plainly and clearly defined by the legislature as to leave no room for doubt or construction. Any person is "a trustee of an express trust" with whom, or in whose name, a contract is made for the benefit of another. The word "contract" is not used in a limited or restricted sense, but it is used and intended to be applied to all and any kind of contracts. As the note sued upon was made for the use of William Mondy, this action might have been prosecuted in his name under the third section of article two of our code; but as it is payable to Alfred Mondy, for the use and benefit of William Mondy, it thereby makes Alfred Mondy the "trustee of an express trust," and the suit is properly prosecuted in his name under the fourth section above quoted. The attorney for the appellant has filed two briefs, in which he has displayed great research, ingenuity, and ability in the discussion of this and other questions in the cause. It is claimed by the appellant that this court, in the case of *Swift v. Ellsworth*, 10 Ind. 205, has given such a definition of the words, "a trustee of an express trust," as to demonstrate that Alfred Mondy is not and cannot be "a trustee of an express trust" under and by virtue of the instrument sued on. We have examined that case with care. It was an action brought by Ellsworth on a promissory note, which had been assigned to him. The defendant, Swift, among other things, pleaded that Ellsworth was not the real owner of the note, and consequently was not the real party in interest, and had no right to prosecute the action in his own name. The facts were fully set out in this paragraph of the answer. Ellsworth demurred to this para-

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graph of the answer, and the demurrer was sustained. Ellsworth maintained, in this court, that the assignee of a promissory note, who might hold it as such, without any real interest in it, was one of that class of persons referred to in the fourth section above quoted, as being "expressly authorized by statute to sue." This court, in deciding that point, say: "We are of opinion that the clause of this section, above quoted does not have reference to the rights of the assignee of a promissory note, but to such persons as may be authorized to sue in their own names, because of holding some official place, as the president of a bank under the general law, or as the trustee of a civil township." The fourth section above quoted embraces four classes of persons: first, an executor; second, an administrator; third, a trustee of an express trust; fourth, a person expressly authorized by statute. In the case referred to, the construction was placed on the fourth clause of said section and not on the third. This case does not conflict with the construction that we have placed upon the third clause of the section under consideration.

We have also been referred to the case of *Rawlings v. Fuller*, 31 Ind. 255. This was an action brought by Fuller against Rawlings. The complaint was in two paragraphs. The first was for the recovery of the possession of real estate and damages for the use and profits thereof. The second was for the rent of the said real estate. The right of the plaintiff to prosecute the action in his own name was raised by demurrer and answer. The contract referred to and made a part of the complaint showed that it was made with Fuller as the agent of the heirs of Sarah Floyd, who were the owners of the real estate. There was no promise to pay the rents to Fuller. He had no interest in the real estate or in the rents. He was not the trustee of the owners, but was simply the agent of such owners, having no beneficial interest in the action. This court say:

"We do not think the facts stated constitute Fuller the trustee of an express trust, within the meaning of the fourth section of the code; they only show, at most, that he was

the agent of the owners, with authority to rent the property for them. They are the only parties in interest, and the action should have been prosecuted in their names. It does not appear, either by the agreement or the complaint, that Fuller had any personal interest whatever in the contract. One who contracts merely as the agent of another, and has no personal interest in the contract, is not the trustee of an express trust within the meaning of the statute, and cannot, under the code, sue on such contract in his own name."

This case sustains the view we have taken, and it is strongly supported by the case of *Minturn v. Main*, 3 Seld. 220.

We have also been referred to the case of *McBroom v. The Corporation of Lebanon*, 31 Ind. 265. That case is not in point. The only point decided in that case was this: McBroom had contracted with "the corporation of Lebanon," and when he was sued he insisted that the plaintiff was not the real party in interest. This court held, that having contracted with "the corporation of Lebanon," he was estopped from denying the existence of such corporation at the time the contract was made and its right to prosecute the action. The case of *Minturn v. Main*, *supra*, strongly tends to show that the appellant in this case is estopped from denying the right of the appellee to prosecute this action, but it is not necessary for us to decide this point. We are of the opinion that the instrument sued on constituted the appellee "a trustee of an express trust," and that the action was properly prosecuted in his name. The court below should have overruled the demurrer to both paragraphs of the complaint. The matters set up in the second paragraph of the complaint, attempting to explain, vary, and contradict the written instrument, were unnecessary and improper, and should have been stricken out by the court of its own motion. *Hays v. Hynds*, 28 Ind. 531. They may be regarded as mere surplusage, and as there were facts enough stated in the second paragraph, aside from these matters, the court committed no error in overruling the demurrer.

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The appellant filed an answer in six paragraphs. The first was, that the note was executed without any consideration whatever. The second was, that the execution of the note had been obtained by fraud, covin and misrepresentation. The third was, that the plaintiff was not the real party in interest. The fourth was a set-off. The fifth was a failure of consideration. The sixth was the same as the third, except the facts were more fully and accurately stated. The facts to support these paragraphs of the answer were properly set out. The appellee replied by the general denial, and three affirmative paragraphs. There was a demurrer filed by the appellant to the second, third and fourth paragraphs of the reply. The demurrer was sustained as to the fourth, and overruled as to the second and third, and proper exceptions were taken. But no question is made in this court upon the ruling of the court on the demurrer to the reply, and we do not deem it necessary to determine whether the ruling was right or wrong. The cause was tried by a jury, who found a general verdict in favor of the appellee for the principal and interest of the note, and under the direction of the court, found the facts specially, in answer to certain interrogatories submitted to them by the court at the request of the appellant.

The appellant moved the court for a judgment in his favor on the special findings, notwithstanding the general verdict, for a new trial, in arrest of judgment, and for a *venire de novo*; all of which motions were overruled, and exceptions were taken. The evidence is not in the record. We have examined with care the special findings, and are of the opinion that, taken altogether, they sustain and support the general verdict. The motion for judgment on them was properly overruled. The evidence not being in the record, we cannot say that the court erred in overruling the motion for a new trial. The conclusion to which we have arrived as to the right of the plaintiff below to prosecute this action in his own name, necessarily sustains the action of the court below in overruling the motions in arrest and for a *venire de novo*.

The judgment is affirmed, with costs.

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ON PETITION FOR A REHEARING.

BUSKIRK, J.—The appellant has filed an earnest and able petition for a rehearing. The rehearing is asked on two grounds. First, that the court erred as to the law of the case as expressed in the opinion heretofore delivered. Second, that since the rendition of the decision in this case, it has been ascertained that the note sued on was executed on Sunday.

We have had no difficulty or hesitation in overruling the petition on the first ground. We are entirely satisfied with the opinion heretofore delivered. We have, in several cases, since the rendition of said judgment, referred to and approved the principles contained in the original opinion in this case, and entertain no doubt that the law is correctly stated.

The second point relied upon is for the first time presented for our consideration. It has been the long and well-settled practice of this court, not to consider on a petition for rehearing a question that was not presented and considered on the original hearing of the case; but, aside from this question of practice, a majority of the court are of the opinion that the question sought to be raised does not arise upon the demurrer to the complaint. The point insisted upon is, that the note having been executed on the first day of the week, commonly called Sunday, it is absolutely void. By the common law, a contract made on Sunday was valid, and such a contract only becomes invalid under and by force of our statute, which makes it unlawful for persons to perform common labor, or pursue their usual avocations, on Sunday. But there is an exception in this statute in favor of "such as conscientiously observe the seventh day of the week." The exception being in the body of the statute, it is necessary that it should be shown by proper averments that the act complained of does not come within the exception. This cannot be done by demurrer, but must be done by answer. Our statute only affects such persons as do not conscientiously observe the seventh day of the week, and, consequently, a contract made on the first day of the week by

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persons who conscientiously observe the seventh day of the week is valid, and can be enforced in our courts.

But there is another reason why the question cannot be properly raised by demurrer. Contracts that are prohibited by law because they are, in their nature, contrary to public policy, or repugnant to the good of society or public morals, are void, and in their very nature incapable of subsequent ratification. But contracts void only because made on Sunday, proper and lawful in all other respects, stand on a different basis, and form an exception to the general rule, that void contracts are incapable of subsequent ratification. *Love v. Wells*, 25 Ind. 503.

The contract sued upon, although void under our statute, was capable of subsequent ratification. The question should have been raised by answer, so as to have given to the plaintiff the opportunity of replying a subsequent ratification. The note was executed on the first day of September, 1867, which was on the first day of the week. The ground of demurrer was, that the complaint did not contain facts sufficient to constitute a cause of action. A majority of the court, for the reasons above stated, are of the opinion that the petition for a rehearing should be overruled.

PETTIT, C. J., is satisfied with the correctness of the original opinion, but is of the opinion that the question as to the validity of the contract was properly raised by the demurrer, and is, for that reason, in favor of granting a rehearing.

W. A. McKenzie, for appellant.

L. M. Campbell, for appellee.

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CITY OF EVANSVILLE and Another *v.* PFISTERER and Others.

CITY.—*Street Improvement.—Estoppel.*—Where an owner of property in a city sees a contractor go on and make a street improvement adjoining said property,

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under a contract with the city, and makes no objection while the work is being done, he cannot, after the work is completed and accepted by the city as having been done according to the contract, enjoin the collection of the entire assessments made for such improvement, on the ground that the materials used and the work done were not strictly in accordance with the contract; in such case, a complaint for an injunction must show a tender, by the property owner to the contractor, of the value of the improvement.

APPEAL from the Vanderburgh Circuit Court.

PETTIT, C. J.—This was a complaint by the appellees against the appellants, to enjoin the sale of sundry lots in the city of Evansville, for the payment of assessments made by the city authorities for street improvements.

The complaint alleges, that appellant Gavisk, the city collector, is about to sell sundry lots mentioned in the complaint, which are owned by the plaintiffs, severally and respectively, and enumerates the several lots owned by each of the plaintiffs, and shows that each of the plaintiffs is the owner in severalty of one or more lots mentioned, and that some of said lots front or abut upon Front street in said city, some of them upon High street, some on Fifth avenue, and others upon Fulton avenue; all within the corporate limits of said city; that in 1867, the common council passed an ordinance, fixing rules and specifications by which contractors were to be governed in the improvement of streets, of which a copy is made an exhibit to the complaint, and which, among other things, provides: 1. That the street is to be brought to the proper grade and shape under the direction of the mayor and surveyor. 2. That where streets are paved with gravel, screened river gravel shall be used, to be of the average depth of twelve inches, with a covering of mould of two inches. 3. Samples of the quality of the material to be used are to be deposited by the bidder. 4. The work to be done in the most approved manner, and all material to be of the best kind.

The complaint further alleges, that pretending that said lots described in the complaint are liable to be sold for the payment of certain assessments for improvements, made by one Lowry, under a contract, which is set out as an exhibit to the

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complaint, the defendant, Gavisk, as city collector, has advertised for sale at public auction, said several lots, and will, unless restrained, sell the same for the satisfaction of said assessments.

The advertisement is also made an exhibit to the complaint, and contains the names of the plaintiffs, with a description of the lots mentioned in the complaint, with the sum assessed to each, and a notice that the same will be sold for the payment of the respective sums on a given day.

The contracts referred to are alike, except as to locality, and all bind the contractor to make the improvements upon the several streets according to the plans and specifications on file in the city clerk's office, and under the direction of the mayor and city surveyor, or such committee as the common council of the city may appoint for the purpose. The specifications are made part of the contract, and part of the exhibit, and provide that the grading is to be done by the city to the proper form and depth, and under the direction of the city surveyor; in other respects these specifications are in exact compliance with the ordinance above referred to.

The complaint then alleges, that the proceedings of the common council, under which the assessments were made, and the payment thereon attempted to be enforced, are illegal and void:

1. Because Lowry, the contractor, without any authority, changed the grade of the streets upon which the improvements are made, and, under the pretense of performing his contract, placed on said streets a mixture of sand and gravel, in the proportion of one-fourth of sand to three-fourths of gravel, and placed on the same some kind of clay, not mould, but did not place on either of said streets the quantity of screened gravel specified in said contracts, and the shape of the surface of said streets was fixed by said Lowry, or some other person, and not by said common council.

2. That said pretended assessment and the alleged contract with said Lowry are based upon an order of said common

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council, passed September 7th, 1868, and which is made an exhibit to the complaint.

The order referred to reads as follows :

“ MONDAY, September 7th, 1868.

“ *Ordered*, That the clerk advertise for sealed proposals until the fifth day of October, 1868, for graveling on Front street, from the east side of Pigeon creek to the east side of Sixth avenue, thence parallel to the boundary line of Front street to the east side of Fulton avenue; also, on Fifth avenue from Front street up to the north line of Second street, thence along Second street to the eastern boundary of Lamasco; Fulton avenue from Front street to north side of Second street; and High street from the western boundary of the Fourth Enlargement to the west side of Leet street.”

And it is alleged that the same is illegal and void in this : that it is not shown that three-fourths of all the members of the common council concurred in ordering and requiring said improvements upon said streets, nor does it show the manner in which such improvements should be paid for, as required by the thirty-eighth section of the charter of said city.

3. That the mayor and city surveyor did not, within five days of the making of said contract, make to the common council a report in writing, in accordance with the second section of the ordinance on this subject (Ordinances, page 20); nor did they make any report in writing within the time required by law, and by reason of said failure to make said report the plaintiffs were prevented from executing the written undertakings mentioned in sections four and five of said ordinances, and thereby they lost eight per cent. upon the amount of said assessments.

Prayer for an injunction.

The defendants moved the court to strike out all the names of the plaintiffs, and all the allegations in the complaint except the names of the owners of lots on High street, and those allegations relative to the improvement on High street, for irrelevancy and impertinence; but the motion was overruled, and the defendants excepted.

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The defendants then filed a demurrer to the complaint, assigning: 1. The absence of sufficient facts. 2. A misjoinder of causes of action. 3. A defect of parties plaintiffs, in this: that several parties plaintiffs were improperly united.

But the court overruled the demurrer, and the defendants excepted.

The defendants then filed an answer in two paragraphs. The first paragraph admits that the order of the common council directing the assessment and which was the commencement of the proceedings referred to in the complaint was, and is, informal, but alleges that said informality arose from a clerical error, which having been discovered, said order was, by a resolution and order, duly entered on the first day of November, 1868, and before the ratification of the contract with said Lowry and the approval of his bond, duly corrected, and said improvement of said streets duly authorized according to the requirements of the charter and ordinances of said city, a copy of the curative or *nunc pro tunc* order is made an exhibit to this paragraph, and is as follows:

It shows, by name, the presence of eight councilmen, and recites that on the 7th day of September, 1868, it was by the common council unanimously ordered, determined, and required that the several streets, describing them as described in the complaint, be improved, graded, graveled and guttered, according to the plans and specifications theretofore adopted for the making of like improvements; that thereupon, by the unanimous vote of all the councilmen then present, being a quorum, and more than three-quarters of the whole number, the council did order the city clerk to advertise for proposals for making said improvement, but by a clerical omission in making up the minutes, said orders were not correctly and fully entered. It further recites that in pursuance of said orders, so informally entered, the contract for making said improvements was, in accordance with the ordinances of said city, duly let to Jacob S. Lowry for the price mentioned in the contract and specifications mentioned in the complaint. The order then proceeds: "Now, therefore, to confirm the action

of the common council so ordering and requiring said improvements, and to correct said imperfect entries so made in said minutes, it is now here ordered that the several streets (describing them as in the contract set out) be improved by grading, guttering and graveling the same in the manner indicated by the plans, drawings and specifications prepared by the city surveyor, and now on file in the city clerk's office, and that the order of the council awarding said improvement to Jacob S. Lowry, be, and the same is hereby ratified and confirmed, and the question being put, shall the order be adopted? stood as follows: Ayes,—Blemker, Steel, Stockfleth, Scriber, Reitz, Kolle, Rœlker, and Jones. Ayes, 8; Noes, 0."

This paragraph further alleges, that immediately after the entry of the last mentined order, and the adoption of the contract with Lowry, to wit, on the same day, the mayor and city surveyor did report to said common council the apportionment mentioned in the complaint, in accordance with the provisions of the third section of the city ordinances, of which a copy is filed, and said common council did, then and there assess and charge the expense so apportioned to the several lots and parts of lots fronting upon the several streets mentioned, according to the second section of the same ordinance, a copy of which is filed.

This paragraph of the answer further denies that Lowry changed the grade as charged in the complaint, but alleges, that if changed, it was done by the city surveyor, by whose plans, and under whose supervision, under the direction of said common council, said work was done; and that said contract was completed to the acceptance of the common council, in all respects according to the provisions of the sixth section of said ordinance, of which a copy is filed, and said plaintiffs made no objection until said improvements had been made, accepted, and paid for.

The second paragraph of the answer denies that Lowry changed the grade, alleges that the improvement was made in conformity with the grade fixed by the city authorities, and in strict compliance with the specifications set out in the

complaint and the contract with Lowry, and that the work was performed under the superintendence, inspection, and direction of the city surveyor and a committee of the common council. This paragraph, also, admits the irregularity of the order, and alleges the correction by the *nunc pro tunc* order, as in the first paragraph, referring to the same exhibit; and alleges the making of the report by the mayor and surveyor as in the first paragraph, and that the same was entered on the minutes of the council, referring to the same ordinance referred to in the first paragraph. It further states that the common council, on the same day, by unanimous order assessed the improvements so ordered upon the several lots and parts of lots fronting on or adjoining said several streets, respectively, in strict accordance with said charter and ordinances, and thereupon said assessment was duly recorded and remains on record in the office of the city clerk; whereupon the mayor of said city tendered each of said plaintiffs a written undertaking for the payment of said several sums so assessed, in all respects in accordance with the provisions of said ordinance, but they, and each of them, refused to execute the same.

The ordinance referred to in the answer is, in substance, as follows:

The first section provides, that when the common council propose to require an improvement to be made, an order designating the improvement shall be passed, and thereupon the clerk shall advertise (directing specifically the mode) for proposals for making the improvement. It also directs the mode of letting the work.

Section two provides, that, in all cases, unless it is otherwise ordered, improvements of streets shall be assessed and charged against the lots and parts of lots adjoining the street improved, equally per front foot.

Section three provides, that, within five days of the letting of any contract for improvement, the mayor and city surveyor shall make a report apportioning the cost among the lots adjoining or abutting upon the street improved, accord-

ing to the principle of taxation established by the second section, and points out in detail what the report shall contain, and that after the same is approved by the council it shall be recorded by the clerk.

Section four provides, that at any time within three days after the approval of the report, any owner of real estate shall have the privilege of giving, to the acceptance of the mayor, a written undertaking, with security, to pay his assessment. The same is to be payable to the contractor in the mode pointed out, and the contractor is required to accept these contracts in satisfaction for so much money, and the mayor shall take the contractors receipt for the amount as a payment, when he delivers over such undertaking to the contractor. And in case the property holder gives his undertaking and pays it promptly, he is entitled to a drawback of eight per cent. on the amount of his assessment.

Section six provides, that as soon as the contractor shall have completed his contract, to the acceptance of the council, the mayor shall make a statement or report to the council, showing what real estate owners have given undertakings, and what undertakings have been given to the contractor, with the amount of each, and the lot for which it was given; and thereupon the council shall issue a separate precept against each piece of property for the sum assessed against the same, unless the same shall have been paid, either by an undertaking or in cash.

A demurrer was sustained to each paragraph of the answer, and the defendants excepted; and the defendants declining to answer further, the court rendered a final decree against the defendants, enjoining the collection of the assessment and for costs, and the defendants excepted and prayed an appeal, and now assign for error:

First, the overruling of the motion to strike out part of the complaint; second, the overruling of the demurrer to the complaint; third, the sustaining of the demurrer to the answer; fourth, the rendition of the final decree.

The motion to strike out parts of the complaint was over-

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ruled and excepted to; the appellants then filed their demurrer for the causes above shown, which was overruled and excepted to. It is not necessary for us to enter into a discussion as to the correctness of these rulings, so far as they apply to the question of parties to the suit, for all errors in them on that point are waived by the brief of the appellants; but we intimate (not wishing to be bound by it), that the demurrer was well taken, and ought to have been sustained. 2 G. & H. 47, sec. 19, and the authorities there cited in the notes. The city of Evansville exists by a special charter, and not under the general law of the State for the organization of cities, and the sixth section of the charter is as follows:

“Whenever the owners of lots or parts of lots shall desire to have any improvements or repairs made, in or upon any street or alley, or part of street or alley, in front or rear of, or adjoining such lots or parts of lots, or grading or paving, graveling, curbing, guttering, or in any other way, and the owners of five-eighths of the whole number of feet of ground on each side of the street or alley, or part of the street or alley proposed to be improved, shall, by themselves or their agents, express their desire, by petition to the common council, stating in each petition, distinctly and plainly, the improvement or repairs desired to be made, it shall be the duty of the common council to cause such improvements or repairs to be made in the best and most economical manner, and the expense thereof shall be assessed and charged against all lots and parts of lots fronting on, or adjoining the street or part of street or alley, or part of alley so improved or repaired as aforesaid, equally per front foot, or according to the value of such lots or parts of lots; and in order that it may, at all times, be seen whether the subscribers to such petition represent the requisite number of feet, the clerk shall enter upon the record of the minutes of the proceedings of the common council the petition upon which any such improvements or repairs are ordered to be made, stating on the record the names of the petitioners, and the number of feet

represented by each; and the common council may provide, by general ordinance, for the collection of the cost and expenses of any such repairs and improvements, and provide, also, by such ordinance, for the sale of the fee simple, or any other estate, in any lot or part of lot on which any such expenses remain unpaid, and for the conveyance of the lot or part of lot, or the estate therein, so sold to the purchaser, and such sale and conveyance shall vest a good and indefeasible title in the purchaser to the estate or interest so sold. Public notice of the time and place of every such sale shall be given by publication in a newspaper printed and published in the city, at least two weeks successively, next before the sale; *Provided*, That the expenses of making such improvements or repairs shall not be assessed on lots or parts of lots fronting on the street or alley improved or repaired, according to the value of such lots or parts of lots, unless three-fourths of all the councilmen shall concur in ordering the same to be so assessed, nor shall the improvement on any lot or part of lot be considered in making any such *ad valorem* assessment; *And provided, also*, That the common council, with the concurrence of three-fourths of all the members thereof, may order and require any and all such improvements and repairs of streets and alleys to be made without petition, and either charge and cause any and all part of the expenses thereof to be collected as above in this section provided, or cause such expenses, or part thereof, to be paid out of the general revenue of the city; *And provided, also*, That the word 'street' or 'streets,' wherever the same is used in this section, shall be construed to include sidewalks."

The real question for us to determine in this case is, can a property owner in a city see a contractor go on and make improvements in front of his property, under a contract with the city, making no objection while the work is being done, and after the work is done and accepted by the city as having been done according to the contract, enjoin the collection of the proper expenses of such improvement, by alleging that the materials used and the work done were not *strictly* in ac-

cordance with the contract? We think he cannot. The first rule of equity is, "that he who seeks equity must do equity;" and he who was benefited by the work should have tendered the value of the improvement to the contractor before he brought a suit to enjoin the payment of the whole expense of the work. There is no equity in the complaint, and no right is shown to have an injunction. *Cox v. Clift*, 2 N. Y. 118; *The Mayor, &c., v. Meserole*, 26 Wend. 131; *Ward v. Dewey*, 16 N. Y. 519; *Heywood v. The City of Buffalo*, 14 N. Y. 534; *The Board of Com'rs, &c., v. Silvers*, 22 Ind. 491; *Hellenkamp v. The City of Lafayette*, 30 Ind. 192; *Motz v. The City of Detroit*, 18 Mich. 495.

The demurrer to the complaint, for want of sufficient facts to constitute a cause of action, ought to have been sustained.

Judgment reversed, at the costs of the appellees; cause remanded for further proceedings not inconsistent with this opinion.

A. Iglehart and C. Denby, for appellants.

YOUNG v. THE STATE.

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157	868

APPEAL.—Effect of.—Trial De Novo.—Where an appeal has been taken and perfected from the judgment or determination of an inferior court to a superior court (as from the board of county commissioners or a justice of the peace to the circuit court or the court of common pleas), and the cause or matter is to be tried in such superior court *de novo*, upon the original papers, the appeal operates to suspend further proceedings under said judgment or determination.

SAME.—Liquor Law.—License.—Where an appeal has been taken by remonstrants from an order of the board of county commissioners granting a license to a person to retail intoxicating liquors, and such person has received notice of that fact, the appeal thenceforward suspends said order and the right to sell under such license. *Molihan v. The State*, 30 Ind. 266, explained and criticised.

APPEAL from the Monroe Common Pleas.

DOWNEY, J.—This was a prosecution against the appellant

for retailing intoxicating liquors without a license. The facts, as stated in the appellant's brief, are as follows:

Appellant, at the September term, 1870, of the board of commissioners, obtained a license to retail, and on the same day paid the money to the treasurer of the county, and obtained his license from the auditor. On the twenty-second day of the same month, certain persons, who had remonstrated against the granting of the license, appealed from the order of the board granting the license, to the common pleas, which appeal was still pending at the time of the trial of this case.

After the appeal, and notice thereof to the appellant, he sold intoxicating liquors as charged in the affidavit.

The position taken by the appellant is, that the appeal did not, in any way, affect the right to retail which had been granted to, and vested in, him by the order, the payment of the money, and the receipt of the license. The cases to which we have been referred by counsel for the appellant generally relate to appeals from inferior courts to a court for the correction of errors, and where the appellate court does not try the case as an action originally commenced before it.

When an appeal is taken and perfected from the judgment or determination of an inferior court to a superior court, as in the case of appeals from the board of commissioners, or from a justice of the peace to the circuit or common pleas court, and the cause or matter is to be tried in the circuit or common pleas court *de novo*, upon the original papers, the appeal operates to suspend or supersede further proceedings under the judgment or determination from which the appeal is taken. This rule applies to appeals from orders of the commissioners granting licenses to retail intoxicating liquors.

It has been decided by this court, in *Molihan v. The State*, 30 Ind. 266, that such appeal by remonstrants from an order granting a license to retail operates to suspend the order and the right to sell under the license.

The remarks of the court in that case, on overruling the petition for a rehearing, to the effect that the party receiving

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such license would be criminally responsible for selling during the time intervening between the issuing of the license and the taking of the appeal, while the order and the license were in full force, were not necessary to the decision of the question; as it appeared that the selling, in that case, took place *forty-seven days after* the appeal had been taken. Such a construction would operate very harshly, and in citing the opinion we do not wish to be understood as approving such remarks.

In the case at bar, however, the evidence shows, and it is conceded by the counsel for the appellant, that he sold as alleged in the affidavit, after the appeal had been taken, and after he had received notice of that fact.

The judgment of conviction is affirmed, with costs.

PETTIT, C. J., dissents.

P. C. Dunning, J. S. Hester, and E. K. Millen, for appellant.

B. W. Hanna, Attorney General, for the State.

CITY OF KOKOMO v. WILLS.

COSTS.—City.—Appeal.—Where in a prosecution by a city to enforce an ordinance thereof an appeal is taken, the city, if unsuccessful, is liable for costs in the appellate court.

APPEAL from the Howard Circuit Court.

DOWNEY, J.—This was a prosecution under an ordinance of the city, commenced before the mayor, and appealed to the circuit court, where there was, on a trial by jury, a verdict for the defendant. On this verdict the circuit court rendered judgment for costs against the city. The only question in the case in this court is, whether the city was liable for costs or not.

The only statutory provision to which we are referred for the exemption is that contained in section thirty of the general law with reference to the incorporation of cities, which, after speaking of the duty of the city attorney to prosecute all actions in favor of the city, and defend all actions brought against such city for any cause, provides, that "in no case shall the city be liable for costs."

The costs taxed in the circuit court were those of the clerk, sheriff, witnesses, jury, and court docket fees, amounting to fifty-one dollars and ninety-two cents. None of the costs which had accrued before the mayor seem to have been embraced in the judgment of the circuit court. We understand that the practice is, in the mayor's courts of the various cities which are living and acting under this general law, to tax no costs against the city in cases for violations of the ordinances, when the case is decided against the city.

But the question here is this: is the city liable for costs in the appellate court, when the case in that court goes against her, or does the statutory protection from liability continue to the end of the suit?

It is provided in section seventeen of the act relating to cities, that, "in all actions in the city judge or mayor's court, either party may have a trial by jury and a change of venue to a justice of the peace in such city, and an appeal to a court of competent jurisdiction, under the same restrictions, and in the same manner as in a justice's court." But it is not specially provided how the case shall be heard and disposed of in the appellate court.

Regarding a city simply as a corporation, there would seem to be no good reason why she should not be liable to pay costs as other corporations. Section twenty-two of article four of the constitution of the State declares, that "the general assembly shall not pass local or special laws, in any of the following enumerated cases;" and among them is, "regulating the practice in courts of justice."

Section twenty-three declares, that "in all the cases enu-

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merated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform application throughout the State."

The question relating to the costs in a cause, as to the right to recover them or not, is a question relating to the "practice in courts of justice;" and though this provision exempting cities from payment of costs applies to all cities, it does not apply to all litigants. Suppose it were provided by law that in any suit by or against a railroad company, or an insurance company, or an incorporated bank, the corporation should not be liable for costs; would the fact that the exemption applied to all of such corporations of one class exempt the statute from the charge of being special?

To hold the exemption contended for valid, would be to hold that in every case, whether to enforce the ordinances of the city, or to enforce any right in favor of or against the city, where she failed, the officers, witnesses, and others rendering services would be left without compensation.

Without intending to decide anything beyond the exact question before us, we hold that in a prosecution by the city to enforce an ordinance thereof, on appeal, the city is liable for costs, when unsuccessful, in the appellate court.

The judgment is affirmed, with costs.

C. N. Pollard, for appellant.

A. S. Bell, for appellee.

THE INDIANAPOLIS, PITTSBURG, AND CLEVELAND RAILROAD
COMPANY *v.* MUSTARD.

RAILROAD.—*Injury to Animals.—Damages.*—Where an animal is so badly injured by a passing train of cars upon a railroad track that it must soon die from the injury, and the railroad company is liable therefor to the owner of the animal by reason of its track not being securely fenced, and the owner kills

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the animal, but receives no benefit from it after the injury, evidence of the value of the animal after the injury is not admissible for the purpose of reducing the damages.

APPEAL from the Madison Common Pleas.

WORDEN, J.—This was an action by the appellee against the appellant for injuring and killing a cow belonging to the plaintiff, by the engine and cars of the appellant, upon her railroad, where the same was not properly fenced. Trial by the court; finding and judgment for the plaintiff, a motion for new trial being overruled.

It appears by the evidence that the plaintiff's cow, being upon the railroad track, was struck by the pilot of an engine, and carried or dragged some distance along the track, and then thrown off; that one of her legs was cut entirely off, except a small portion of the skin, and another leg broken; and that she was so badly injured that she could not recover. She lay in this condition a day or two, when the plaintiff killed her, but did nothing further with her; and she was afterwards buried by the employees of the defendant.

During the progress of the trial, the defendant, for the purpose of "fixing the damages," offered to prove the value of the cow after she was thus hurt, but the testimony being objected to, it was excluded. Under the circumstances, we cannot say that this was error. The plaintiff, out of motives of humanity, doubtless, and to end her misery, killed the cow, but derived no benefit whatever from her defunct carcass; and then she was taken charge of by an employee of the defendant who performed her final obsequies by consigning her to the earth, where she could be a source of profit to no one.

Had the plaintiff actually received some benefit from the cow after she was hurt or killed, the question would have been a different one. We take it to be quite clear on principle, that if a railroad company, or any private individual, kill the animal of another, under circumstances that render the company or the individual liable therefor, the rule of damages will be the value of the animal, unless the case calls for vin-

The State, *ex rel.* Childers, *v.* Delano and Others.

dictive or punitive damages; and these damages are not to be diminished by the value of the dead animal, unless the owner thereof in some way derives an actual benefit therefrom, or does some act evincing an election to appropriate the dead animal to himself. A man whose animal is wrongfully killed is not obliged to take the dead animal in part pay for the living one.

We regard the case before us as substantially one of killing. The cow must have died from her injuries, and the defendant is responsible for her full value.

We have examined the evidence in the cause, and are satisfied that the finding of the court, in respect to the damages assessed, and also in respect to the liability of the defendant, accords with the preponderance thereof.

The judgment below is affirmed, with costs and five per cent. damages.

J. A. Harrison, for appellant.

W. R. Pierse and *H. D. Thompson*, for appellee.

THE STATE, on the Relation of CHILDERS, *v.* DELANO and Others.

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SUPREME COURT.—*Assignment of Errors.*—On appeal to the Supreme Court, the assignment of errors must contain the full names of the parties to the appeal, and must be signed by the appellant or his attorney *as such*; otherwise, the appeal will be dismissed.

APPEAL from the Marion Common Pleas.

PETTIT, C. J.—The only assignment of error is as follows:

“We assign for error the dismissal of the cause from the docket of the court of common pleas. Trans. line 352, *et seq.* B—— & C——.”

This is not a compliance with the statute, 2 G. & H. 275, sec. 568; nor with rule eighteen of this court, which requires that “the assignment of errors shall contain the full names

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of the parties, and process, when necessary, shall issue accordingly." Nor does it comply with the rulings of this court. *Henderson v. Halliday*, 10 Ind. 24. The assignment of errors is a pleading tendering an issue of law only, and must be signed by the party or by his attorney. The assignment is in the nature of a declaration or complaint, and, therefore, requires the full names of the parties as much as an original complaint, and must be signed by the appellants or their attorneys *as such*. *Hollingsworth v. The State*, 8 Ind. 257.

The names of the parties are not set out in the assignment, nor is it signed by the appellant or his attorneys as such. A strict adherence to the rule is necessary to enable the clerk to see at a glance who are the parties in this court, and against whom to issue process or notice, when required; nor will it be without benefit to attorneys and the court, in examining the record and the questions therein presented.

Appeal is dismissed; judgment for costs against the appellant.

D. V. Burns and V. Carter, for appellant.

N. B. Taylor, for appellees.

BICKLE v. SWARTZ.

ASSIGNMENT OF ERRORS.—*New Trial.—Exclusion of Evidence.*—Where the overruling of a motion for a new trial is not assigned as error, the Supreme Court will not examine a question as to the exclusion of evidence.

APPEAL from the Wayne Circuit Court.

WORDEN, J.—There is but one assignment of error in this cause, and that relates to the exclusion of certain evidence offered by the appellant on the trial of the cause.

There is no error assigned in the overruling of the motion for a new trial.

The error assigned raises no question for our considera-

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tion. *Whitinger v. Nelson*, 29 Ind. 441; *Herrick v. Bunting*, *id.* 467; *Smith v. Crigler*, *id.* 516.

The judgment below is affirmed, with costs.

W. A. Bickle and *J. P. Siddal*, for appellant.

C. C. Binckley and *W. Morrow*, for appellee.

DEARINGER v. RIDGEWAY.

COSTS.—*Draining Association.—Appeal from Appraisers.*—Where on an appeal to the court of common pleas from the proceedings of appraisers appointed under the act of March 11th, 1867, to enable the owners of wet lands to drain and reclaim them, &c. (Acts 1867, p. 186), the appellee recovers judgment, he is entitled to recover the costs in said court, though on such appeal the appellant has reduced the amount allowed against him by said appraisers five dollars or more.

APPEAL from Howard Common Pleas.

BUSKIRK, J.—This was a proceeding under an act entitled, "An act to enable the owners of wet lands to drain and reclaim them, where the same cannot be done without affecting the lands of others, prescribing the powers and duties of county boards and county auditors in the premises, and repealing all laws inconsistent therewith." Approved, March 11th, 1867. See Acts of 1867, p. 186.

The appellant filed a petition with the board of commissioners of Howard county, alleging that he was the owner of wet lands, and desired to have a ditch dug; that the said ditch would affect the lands of the appellee, and that he would be largely benefited thereby, and asked the court to appoint appraisers to assess the benefits that would result to the appellee by the digging of such ditch. The board of commissioners appointed appraisers, who met, examined the premises, and found that the appellee would be benefited in the sum of two hundred dollars.

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The appellee appealed from the action of such appraisers to the court of common pleas of said county. In the court of common pleas the appellee filed an answer, to which the appellant replied. The cause was tried by a jury, who found that the appellee would be benefited in the sum of one hundred and twenty-five dollars. Judgment was rendered on the verdict. Upon the motion of the appellee, the court rendered judgment against the appellant for all the costs in the common pleas court, to which the appellant excepted, and he presents the question by bill of exceptions.

The action of the court in rendering judgment against the appellants for such costs is assigned for error in this court, and this is the only question presented by the record.

Costs are given or withheld by statute. *Smith v. The State*, 5 Ind. 541.

Section 396 of the code provides, that "in all civil actions the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law." 2 G. & H. 225.

"In all civil cases the party recovering judgment shall recover costs, except in those cases where a different provision is made by statute." *Zimmerman v. Marchland*, 23 Ind. 474.

Section 70 of the act regulating the practice in justices' courts, and providing for appeals therefrom, reads as follows: "Costs shall follow judgment in the court of common pleas, or circuit court, on appeals, with the following exceptions: First. If either party against whom judgment has been rendered, appeal and reduce the judgment against him five dollars or more, he shall recover his costs in the court of common pleas or circuit court, when the appellant appeared before the justice." 2 G. & H. 597.

It is insisted by the appellee, that the case under consideration is governed by the above statute, and in support of this position he refers to the eleventh section of the act of 1867. Section eleven reads thus: "Any person aggrieved by the proceedings of the said appraisers, may appeal the same

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to the court of common pleas of the county, upon giving bond, and within the time, as in cases of appeal from justices of the peace, except that said bond shall be filed with the clerk of said court." Acts of 1867, p. 188.

In our judgment, the position assumed by the appellee is wholly untenable. The only effect of section eleven is to give an appeal, and to prescribe the time within which the appeal shall be taken. The act does not provide that the proceeding shall be tried in the common pleas court by the rules and practice prevailing in the trial of causes appealed from the justice's court. But if it did so provide, it is very doubtful whether the ruling of the court in this case, in reference to the taxation of costs, could be sustained. The section above quoted, from the act regulating justices' courts, only gives costs to the appellant if he reduces the judgment five dollars or more, when he "appeared before the justice." In the case under consideration, the appellee had no right to appear, and did not appear, before the appraisers. The appellee also contends in argument that the taxation of costs by the court is right, for the reasons that the act under which these proceedings were had is unconstitutional and against natural right, and that the appellant was not entitled to recover any judgment against him. These important questions were not raised in the court below, by motion, demurrer, answer or motion for a new trial, and cannot be raised or considered in this court. The law presumes that the judgment was correct, until the contrary is shown in some mode known to our code of practice. The general rule is, as we have shown, that costs will follow the judgment; and the appellee has failed to show that this case comes within any of the exceptions prescribed by the statute. The court erred in the taxation of the costs.

The judgment is reversed with costs, and the cause is remanded, with directions to the court below to render judgment for the appellant for the costs that accrued in the common pleas court.

The State, *ex rel.* Allen, Administratrix, *v.* Sherill.

ON PETITION FOR A REHEARING.

BUSKIRK, J.—The appellee has filed a petition for a rehearing in this case. We have re-examined the case, and given due consideration to the petition asking a rehearing. We are entirely satisfied with our decision and the grounds on which it was placed. The appellee insists that our ruling was incorrect, for the reason that it will cause him to pay the expenses mentioned in section eight of the drainage act. Our decision did not cover such expenses. The only point we decided was, that the appellant was, under the law, entitled to recover costs in the common pleas court.

The petition is overruled.

J. W. Cooper and *C. N. Pollard*, for appellant.

J. W. Robinson, for appellee.

THE STATE, on the Relation of ALLEN, Adm'x, *v.* SHERILL.

SHERIFF'S SALE.—*Redemption.*—*Lien of Judgment.*—Where land sold on execution for less than the amount of the judgment on which such execution was issued is redeemed by the judgment defendant, under the act of 1861 (2 G. & H. 251), the priority of the lien of said judgment for the remainder of the amount thereof over other judgment liens continues as if such sale had not been made.

APPEAL from the Putnam Circuit Court.

DOWNEY, J.—This was a proceeding by mandate against the appellee as sheriff of Putnam county, by the relator, to compel him to execute to her a certificate of purchase for certain real estate of which she was the purchaser at sheriff's sale.

The facts are, that on the 12th day of October, 1867, the relator recovered a judgment against Harrison and Martin Allen, which became, from that date, a lien on said real es-

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tate. On the 17th day of February, 1868, William, George, and Moses Risler obtained judgment against said Martin Allen, which also became a lien on said real estate.

On the 16th day of May, 1868, an execution was issued on the judgment of the relator, which was levied on the real estate in question, and it was advertised, sold, and purchased by the relator, and the sheriff gave her a certificate of purchase. After crediting the amount of her bid, there was a balance due on her judgment of four hundred and ninety-eight dollars and some costs.

On the 17th of July, 1869, the lands were redeemed by the execution defendants. On the 21st of July, 1869, the relator caused another execution to be issued on her judgment to collect the balance due, which was levied on the same lands, August 2d, 1869; and on the same day, August 2d, 1869, the Rislers caused an execution to be issued on their judgment, and had it levied on the same land. The land was advertised for sale on both of the executions, and was sold on the 28th day of August, 1869, and again purchased by the relator for the amount of the balance due on her judgment and the costs. She tendered to the sheriff the amount of the costs and offered to receipt her judgment in full, and demanded a certificate of purchase, which the sheriff refused to execute to her on the ground that the Rislers claim to share with her in the amount of the purchase-money. She brought the amount of costs into court.

The sheriff appeared to the action, and demurred to the complaint. The demurrer was sustained, and final judgment was rendered for the defendant.

The position of the appellee is, that the land, on redemption, became subject to the lien of all the judgments alike, as if it had been land the title to which the judgment defendants had acquired after the rendition of all the judgments.

The appellant insists that the title never passed out of the execution defendants, because no deed was executed on the first sale, by the sheriff; and that, consequently, on redemp-

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tion, the priority of her judgment lien was not in any way disturbed.

We are of the opinion that the position of the appellant is correct. The purchase of the land by her and the receipt of the certificate gave her neither the title to the land nor the right to the possession. If the land had not been redeemed within the year, then it would have been the duty of the sheriff to have executed to her a deed, which would have divested the Allens of the title and conveyed it to her, and that would have entitled her to the possession of the land. The sheriff's deed is the vehicle which conveys the title to the purchaser. 2 G. & H. 250, sec. 472.

But it is urged by the appellee, that, while Mrs. Allen held the certificate of purchase, the Rislers could not levy on and sell the land; that she held it with a complete right to it, subject only to redemption; and that when it was redeemed it became again the land of the judgment debtors, and was to be regarded as newly acquired land and subject to the rule as laid down in *Michaels v. Boyd*, 1 Ind. 259, where it is held, that when the judgment debtor is not the owner of land at the time of the rendition of several judgments against him, but afterwards acquires title thereto, each judgment becomes a lien at the same instant that the land is acquired, as if they had all been rendered at the same time; and in such case, the execution first issued and levied has preference.

We cannot assent to this proposition. If the land would sell for any amount over the sum due on the judgment of the relator, the Rislers had only to redeem the land, and then bring it to sale again, when they would have had a lien on the premises for the redemption money against the owner and any junior incumbrancer. Acts 1861, Spec. Sess. 79, sec. 3; 2 G. & H. 251, note.

The judgment is reversed, with costs, and the cause remanded, with instructions to the circuit court to overrule the demurrer to the complaint.

F. T. Brown, for appellant.

S. Claypool, *J. A. Matson*, and *C. C. Matson*, for appellee.

Boulden v. Scircle.

BOULDEN v. SCIRCLE.

ASSIGNMENT OF ERRORS.—*New Trial*.—Where the overruling of a motion for a new trial is assigned as error, this presents to the Supreme Court all the grounds for a new trial properly set forth in the motion, and said grounds for a new trial need not be specially assigned as errors.

EVIDENCE.—*Contribution*.—*Statute of Frauds*.—A. conveyed certain real estate to B. C. and D., to each an undivided one-third portion thereof, in consideration of the verbal agreement of said grantees to pay a certain indebtedness to E. evidenced by certain commercial paper on which A. was principal and B. surety, but to which C. and D. were not parties. This paper was afterwards renewed by other paper to which B. C. and D., with another, became parties, without A. The latter paper was renewed by a note given by B. and C., against whom judgment was obtained thereon, one-third of which was paid by C. and the remainder by B.

Held, in a suit by B. against D. for contribution, that the plaintiff was entitled to prove the consideration of said deed.

Held, also, that D. was liable for contribution.

APPEAL from the Clinton Common Pleas.

DOWNEY, J.—This was an action by the appellant against the appellee, for money paid to and for his use. The plaintiff filed a complaint, and afterwards what is styled a supplemental complaint, but which would with more propriety be denominated an amendment to the complaint.

The complaint is general in its terms, and the supplemental complaint narrates the transactions out of which it is claimed the cause of action arises, alleging that James Snowden had executed his promissory note to the Bank of the State, at Indianapolis, for seven hundred dollars; that the plaintiff, and defendant, and one Baker, executed said note with Snowden, as his securities; that about the same time, Snowden, as principal, and said plaintiff and defendant and said Baker as his securities, executed another note to Alfred and John C. S. Harrison, for five hundred dollars; that afterwards said notes were renewed by said parties from time to time; that in the mean time, Snowden becoming unable to pay said notes, and it being apparent that the same would, therefore, have to be paid by said sureties, Snowden, to indemnify

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them, as far as practicable, with his wife, on the 2d day of September, 1858, executed to Baker and plaintiff and defendant, the sureties as aforesaid, a deed of conveyance for eighty acres of land in Tipton county, which is described in the complaint, subject to a certain mortgage thereon, a copy of which deed is made part of the complaint. That afterwards the note to the Bank of the State was renewed in the names of said sureties only, on which said bank obtained judgment jointly against said sureties, Baker, Scircle, and Boulden, in the circuit court of Clinton county, on the 10th day of April, 1862, for six hundred and five dollars and two cents. That on the 25th day of January, 1860, the plaintiff and Baker lifted and canceled the note held by the Harrisons, by executing to them their two promissory notes of that date, one for three hundred and forty-five dollars, at one year, and the other for three hundred and sixty-four dollars and fifty cents, at two years, which included interest to the maturity of said notes. That on the 12th day of April, 1862, the Harrisons obtained judgment on the notes held by them against Baker and the plaintiff, for the sum of seven hundred and forty dollars and thirty-six cents. That afterwards the defendant paid two hundred and fifteen dollars and fifty-six cents on the judgment in favor of the bank, which was all that he had paid on said claims. That Baker had paid his full share, viz.: one-third of said judgment, interest and costs; and the plaintiff had paid the balance of said judgment in full, to wit, on the judgment in favor of said Harrisons, April 9th, 1863, three hundred and ninety-three dollars and thirty-nine cents, February 19th, 1864, three hundred and thirty dollars; and on the judgment in favor of the Bank of the State, May 7th, 1866, seventy-five dollars, and June 7th, 1866, eighty-eight dollars and twenty cents. That Snowden, ever since the execution of said deed, has been insolvent, and has no property subject to execution. That the plaintiff was compelled by law to pay the amounts aforesaid. That at the time of the execution of said deed of conveyance, it was the express understanding among all parties, that said

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sureties should pay off said claims, each sharing alike in the payments, and each receiving one undivided third part of said land. That the interest of said Scircle in said land was, at the date of said deed, and ever since has been, worth six hundred dollars, and amply sufficient to indemnify said defendant. That said several notes were executed without relief from valuation laws, and the judgments rendered accordingly.

After several motions and a demurrer addressed to the supplemental complaint, which were all overruled, the defendant answered, first, a general denial; and second, he admitted the making of the note to the Bank of the State; that it was taken up by the sureties, and their own notes given, and that judgment was obtained by the bank, but alleges the payment of his one-third part thereof. He also admitted the execution of the deed by Snowden to the securities, for the Tipton county lands; but he denied that he ever executed the note, or became liable to the Messrs. Harrison, or to the plaintiff, for their debt, and denies all the other allegations of the complaint.

Trial by jury, verdict for the defendant, motion for a new trial overruled, and judgment on the verdict. The evidence is in the record by a bill of exceptions.

The new trial was asked for the following reasons: first, that the verdict is contrary to the evidence given on the trial; second, it is contrary to law; third, the exclusion of legal evidence offered by the plaintiff, material to establish his right to recover.

The second error assigned is the overruling of the motion for a new trial. The first is a repetition of the third reason for a new trial, and was unnecessary, as the second assignment of error brings before us the rulings of the court in excluding evidence.

The evidence shows that the defendant had paid his share of the debt due the bank, and the controversy seems to have narrowed down to the question whether or not the defendant was liable to the plaintiff for one-third of the amount

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paid by him in satisfaction of the debt to the Messrs. Harrison.

At the time the deed was made to Boulden, Baker and Scircle, Boulden was the only one of them who was on the paper held by the Harrisons. But at its next renewal after that date, which was on the 25th day of July, 1859, both Scircle and Baker became parties to it, with Boulden and one Scott.

This bill was renewed by a note for three hundred and forty-five dollars, and one for three hundred and sixty-four dollars and fifty cents, drawn by Boulden and Baker, and secured by mortgage on Boulden's real estate; and these are the two notes which were collected by suit by the Messrs. Harrison.

The plaintiff thereupon offered to prove by Snowden and himself, that the sole and only consideration of the deed from Snowden and wife to Boulden, Baker, and Scircle, was their joint agreement to pay his obligation to the Harrisons, represented by the foregoing chain of notes and bills of exchange, and the note to the Bank of the State, which evidence the court refused to allow to go to the jury, and to which ruling the plaintiff excepted. Prior to this, while Snowden was testifying on behalf of the plaintiff, the court ruled out so much of the testimony of this witness as tended to prove that it was agreed as a part of the consideration of the deed, that the vendees were to pay the witness's note to the Harrisons, unless the plaintiff would first prove that the defendant had endorsed or signed that note, or some other note substituted therefor. To this ruling of the court the plaintiff also excepted.

The counsel for the appellee suggests that, as the testimony of the only witness who detailed the history of the Harrison claim in its various renewals, &c., gave his evidence by saying, "that the bank books showed the following state of accounts with James Snowden," &c., the court may have excluded the other testimony offered because this evidence was secondary in its character. It is a sufficient

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answer to this position to say that no objection seems to have been made in the common pleas to the character of the evidence.

The court seems to have proceeded upon the theory that, to make the agreement valid under the statute of frauds, on the part of Scircle, to pay any part of the Harrison debt, in consideration of the execution of the deed to him, and Baker and Boulden, by Snowden, then Scircle must, at that time, have been a party to the paper held by the Harrisons. We think this position is not tenable. As we have already stated, Scircle became a party to the paper given in renewal to the Harrisons, next after the date of the deed. If there was anything in the objection that Scircle could not bind himself by parol to pay the debt, or a share of the debt of Snowden, the objection was removed by his becoming a party to the paper in apparent pursuance of the agreement.

The evidence shows that Scircle conveyed away the interest in the Tipton county land for the consideration of five hundred dollars, and that he paid, in discharge of one-third of the bank debt, two hundred and thirty-nine dollars and seven cents, thus leaving in his hands two hundred and sixty dollars and ninety-three cents, which it would seem he had no equitable right to hold upon his theory of the case.

We think the evidence should have gone to the jury.

Judgment reversed; costs to appellant.

J. N. Sims, for appellant.

L. McClurg, for appellee.

EX PARTE SYLVESTER PROCTOR.

APPEAL from the decision of the Judge of the Court of Common Pleas of the Seventeenth Judicial District.

Crow v. Eichinger.

Proceedings on writ of *habeas corpus*.

PER CURIAM.—On a careful perusal of the evidence, we are satisfied that the prisoner, Sylvester Proctor, is entitled to be let to bail. Therefore it is considered that the judgment below, refusing the admission of the said Proctor to bail, be reversed, and that the cause be remanded, with instructions to the judge below to admit the said Proctor to bail in the sum of ten thousand dollars.

And it is ordered that this judgment be certified down immediately.

A. S. Blake, R. M. Johnson, and O. H. Main, for appellant.

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34	65
156	75

CONSIDERATION.—*Promissory Note.—Patent Right.—Evidence.*—Suit on a promissory note given by the defendant to the plaintiff in consideration of the assignment of a patent right to the former by the latter.

Held, that the fact that after the date of said note another patent for the same invention was issued to another patentee, could not be shown under an answer setting up want of consideration.

SAME.—*Pleading.—Evidence.*—An answer of entire want of consideration will fail if it appear on the trial that there was any consideration, however small.

APPEAL from the Clinton Common Pleas.

DOWNEY, J.—Eichinger sued Crow upon a promissory note. Answer, first, no consideration; second and third, the same, setting out the facts. Reply by way of traverse to the special paragraphs of the answer. Trial by jury, and verdict and judgment for the plaintiff. Motion afterwards during the term, for a new trial, which was overruled, and a bill of exceptions filed showing the points which are relied upon to reverse the judgment.

The first thing complained of is the exclusion of a certified copy of a patent with the accompanying drawings and

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specifications, dated January 14th, 1868, to one Green, offered in evidence by the appellant. The note on which the suit was brought is dated December 4th, 1866. This note was given, in part at least, for the assignment of a patent right by the payee to the maker of the note, and which he claimed to have derived by assignment from one Clark. We do not see how the patent to Green, conceding, as was claimed by the appellant, that it was for the same, or nearly the same, invention, could affect the rights of the parties under a patent issued long before. We think the court committed no error in rejecting the evidence.

The remaining questions relate to the charges of the court to the jury, and to the sufficiency of the evidence to support the verdict of the jury. We have examined the charges and do not discover any objection to them.

The evidence shows that there was a balance due from the appellant to the appellee growing out of sales of the patented article, made before the note was executed, which entered into and formed part of the consideration of the note. Both of the parties, who were witnesses on the trial, swear to this, though they differ as to the amount. As all the paragraphs of the answer set up an entire want of consideration, the defense was, for this reason, not made out. This rule, so far as the decisions of this court are concerned, depends upon the authority of the case of *Whetlock v. Barney*, 27 Ind. 462, citing *Kernodle v. Hunt*, 4 Blackf. 57.

About twenty months elapsed from the date of the note until the suit was brought on it, and it does not appear that Crow took any steps to rescind the contract, or that he ever tendered a reconveyance of the territory conveyed to him at the time of executing the note. The note imported a consideration. The *onus* was on the appellant. We think the evidence was sufficient.

The judgment is affirmed, with five per cent. damages and costs.

J. N. Sims and *C. Sims*, for appellant.

F. B. Everett and *R. P. Davidson*, for appellee.

DEVIN. Guardian, v. SCOTT and Another.

34	67
145	102

HABITUAL DRUNKARD.—Legislative Control.—The act of March 9th, 1867, (Acts 1867, p. 109), "to provide for the care and custody of the person and estate of habitual drunkards," is an enactment within the power of the legislature.

SAME.—Contracts of Drunkards Under Guardianship.—Injunction.—An inquisition under said act by which it is found that a person is an habitual drunkard and incapable of managing his estate, or that there is danger of his squandering it, and the appointment of a guardian for him, are conclusive evidence of the incapacity of such person to make a contract while under such guardianship; and the collection of a judgment rendered against a person while under such guardianship, the guardian not being a party thereto and having no knowledge thereof until after its rendition, on a contract made by said person after inquisition found, will be enjoined at the suit of the guardian, when it does not affirmatively appear that the contract was for necessities furnished said person, the guardian having failed to make needful provision.

APPEAL from the Gibson Common Pleas.

BUSKIRK, J.—The appellant, as the guardian of James A. Devin, filed a complaint in the court below, against the appellees, to enjoin them from collecting a judgment rendered by a justice of the peace in favor of Thomas J. Scott, one of the appellees, and against the said James A. Devin. The court granted an injunction, and afterwards, on the motion of the appellees, the injunction was dissolved, to which the appellant excepted; and she now prosecutes this appeal for the sole purpose of obtaining a reversal of the order of the court dissolving the injunction. This is the only question presented by the record for our decision. The complaint alleges, in substance, these facts, namely:

That in a proceeding pending in the Gibson Common Pleas Court, at the August term, 1867, wherein Nancy Devin was plaintiff, and James A. Devin was the defendant, the Court found that said James was an habitual drunkard, and incapable of managing his estate, and that there was danger of his squandering it; that the court appointed the said Nancy Devin the guardian of the person and estate of the said James A. Devin, and that she duly qualified as such.

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guardian; that the said Thomas J. Scott, on the 30th day of March, 1869, obtained a judgment against the said James A. Devin, before, and in the court of, Andrew J. Wright, a justice of the peace, for the sum of twenty-three dollars and eighty-five cents and costs of suit; that the summons in the said cause had been issued against and served on the said James A. Devin; that the said Nancy Devin as such guardian was not a party to said action, and had no knowledge of it, until long after the rendition of the said judgment; that the contract upon which the said judgment was rendered had been made between the said Thomas J. Scott and the said James A. Devin, after the said James A. Devin had been adjudged an habitual drunkard and incapable of managing his estate and the appointment of a guardian; that an execution had been issued on the said judgment and delivered to the appellee George Reed, as constable, who had by virtue thereof levied on a certain overcoat, being the property of the said James A. Devin, and that the said Reed, as such constable, threatened to sell the said property. The prayer of the complaint was, that the defendants be perpetually restrained and enjoined from the collection of said judgment.

The decision of the question presented will depend upon the interpretation and construction of an act entitled "An act to provide for the care and custody of the person and estate of habitual drunkards" (approved March 9th, 1867). See Acts of 1867, p. 109. The first section of said act confers upon the circuit and common pleas courts the power, when a complaint under oath is filed, alleging that any person is an habitual drunkard, and is the owner of real or personal estate, or both, that he is incapable of taking care of the same, or that there is danger of his squandering it, to hear and determine as to the truth of the matters alleged, after the defendant has received ten days notice of such proceeding. The second section provides that if the court or jury trying the same shall, after the evidence is heard, find that such person is not an habitual drunkard, and is capable of managing his estate, and that there is no danger of his squan-

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dering it, such person shall be discharged, and the costs of the proceeding shall be taxed against the complaining party; but if the court or jury trying the cause shall find that such person is an habitual drunkard, is incapable of managing his estate, or that there is danger of his squandering the same, the court shall appoint some resident of the county (who shall execute bond to the satisfaction of the court, that he will faithfully perform his trust), who shall act as the guardian of such person and his estate under like restrictions and in the same manner, with the same powers and duties as in the case of guardians for minors, and the costs of such proceedings shall be paid out of such person's estate.

The third section provides that the court may, at any time after one year from making such appointment, upon satisfactory proof that such person has reformed and has voluntarily refrained from the use of intoxicating liquor, for at least one year, discharge the guardian and restore the property to such person.

It is claimed by the appellees that the legislature did not possess the power to enact the above statute, for the reason that it deprives a citizen of the right to enjoy, control, and dispose of his property, and to make contracts. We think there is no doubt as to the power of the legislature to pass such a law, or as to the duty of the courts to enforce it in all proper cases. We presume that no one will call in question the power of the legislature to pass laws depriving idiots, lunatics, and all persons of unsound mind, of the power of controlling and squandering their estates, and appointing guardians of their persons and estates. This is done for the protection of such persons as are incapable of protecting themselves. It surely can make no difference whether the inability has existed from birth; or has been caused by disease or accident, or produced by the excessive use of intoxicating liquors. The true inquiry is, whether a person, from any cause, is incapable of making contracts and managing his property. When this fact is found by a competent court, it is the duty of such court to place such person under guar-

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dianship; and when such person is restored to reason and is capable of managing his property and making contracts, then the disability should be removed, and the party restored to all his rights. In England, the court of chancery has the control of the persons and estates of idiots, lunatics, and persons of unsound mind. In this country it is regulated by the statutes of the several states. See 1 Par. Con. 386; 2 Kent Com. 450; *In Re Wendell*, 1 Johns. Ch. 600; *Hovey v. Harmon*, 49 Me. 269.

The next question presented is as to the effect of an inquisition found that a person is an habitual drunkard and incapable of managing his property. It is insisted, in this case, that it does not deprive a person who is placed under guardianship, of the power of making contracts, for the reason that the statute does not, in express terms, declare such contracts void. It is not necessary that the statute should declare contracts made by a person of unsound mind void. The judicial finding that the person was of unsound mind, and incapable of making contracts, and the appointment of a guardian, are conclusive evidence that all subsequent contracts are void, and *prima facie* evidence that prior contracts were void. The Supreme Court of New York, in the case of *Fitzhugh v. Wilcox*, 12 Barb. 235, say: "Indeed, it seems to me perfectly clear that the judgment of the law which pronounces the party a lunatic, and gives over his person and estate to the custody of another, takes away from him, absolutely, all competency to contract, until his rights are restored."

In the same opinion the court say, "The inquisition found and the decree thereon are notice to all the world, and operate as a judicial sentence upon the question."

The same court, in the case of *Wadsworth v. Sherman*, 14 Barb. 169, say, "An inquisition by which a person is found to be of unsound mind and incapable of conducting his own affairs, in consequence of habitual drunkenness, is conclusive evidence of the incapacity of such person." See *M'Donald v. Morton*, 1 Mass. 543; *White v. Palmer*, 4 Mass. 147; *Leonard v. Leonard*, 14 Pick. 280; *Breed v. Pratt*, 18 Pick.

115; 2 Kent Com. 235, 236; and *In Re Gangwere's Estate*, 14 Penn. St. 417. Some of the authorities above quoted hold that an inquisition is not conclusive evidence, but is *prima facie* evidence, and that it is competent to allege and prove that when the contract was made the party had a lucid interval, but the very decided weight of adjudicated cases is in favor of the conclusiveness of the inquisition.

But it is urged, that the debt upon which the judgment sought to be enjoined was rendered may have been created for necessities. This may be true, and yet it may be that it was for intoxicating liquors. We are not informed by the record what the consideration was. But whose fault is it, that we are not informed? The general rule is, that contracts made by a person who has been found incapable of conducting his affairs and placed under guardianship are void. If this case comes within any of the exceptions to this rule, it was the duty of the party relying upon that fact to allege and prove that it came within the exception. The guardian appointed under the act of 1867 is required to "act as the guardian of such person and his estate, under like restriction, and in the same manner, with the same powers and duties, as in the case of guardians for minors."

We have seen that the inquisition and appointment of a guardian are notice to all the world, and it results that persons dealing with the ward or guardian must take notice of the rights of the ward and the powers and duties of the guardian. A minor may make a valid contract for necessities, if the father or guardian has failed or refused to furnish them. Two things have to concur to render such a contract valid; first, that the father or guardian had failed to make needful provision for the minor, and secondly, that the articles sold were "necessaries," within the well-understood meaning of that word. 1 Par. Con. 298; *Gwaltney v. Cannon*, 31 Ind. 227; *McCrillis v. Bartlett*, 8 N. H. 569. We think, upon the facts stated in the complaint, that the court should have decreed a perpetual injunction, and that it erred in dissolving the injunction granted.

Boyer v. Tiedeman.

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to render a decree perpetually enjoining the collection of said judgment.

D. F. Embree, for appellant.

A. C. Donald, for appellee.

BOYER v. TIEDEMAN.

PRACTICE.—*Misjoinder of Causes*.—The joinder of a cause of action sounding in tort with one sounding in contract is, under the code, good ground for a demurrer assigning a misjoinder of causes of action; and where such a demurrer to a complaint has been properly sustained, the plaintiff cannot successfully complain in the Supreme Court of the action of the court below in thereupon rendering judgment against him for costs, where he merely excepted to the ruling on the demurrer, but interposed no objection to the judgment, and took no step for a separation of the causes.

APPEAL from the Elkhart Common Pleas.

WORDEN, J.—Boyer, the appellant, sued the appellee, the complaint containing two paragraphs. The first paragraph is in tort, charging the defendant with fraud in invoicing a stock of goods. It charges, in substance, that the plaintiff purchased of defendant a stock of groceries and fixtures, at five per cent. advance on the original cost; that the plaintiff was a stranger in the place and to the grocery business, and depended entirely upon the defendant to furnish a correct invoice of the goods and the cost thereof; that after the plaintiff had made the purchase, and taken possession of the goods, he found that the defendant had cheated and defrauded him to the amount of three hundred dollars, by invoicing a large part of the goods at a price much above the cost thereof.

The second paragraph sounds in contract. It alleges a purchase of the property as in the first paragraph; that part of the goods were boxed up in a cellar, and difficult of inspection, and that the plaintiff relied upon the defendant's war-

ranty as to the quality of the goods, which turned out to be worthless; it also charges that some of the goods fell short in quantity.

A demurrer was filed to this complaint, assigning for cause a misjoinder of causes of action, which was sustained, and exception was taken by the plaintiff. After sustaining the demurrer, the court proceeded to render judgment for the defendant for costs. To this action of the court no objection was made or exception taken; nor was the court asked to order the misjoinder to be noted on the order book, and cause separate actions to be docketed; nor did the plaintiff file, or offer to file, a complaint in each of the causes.

There was no error in the ruling of the court on the demurrer. Before the code of procedure, causes of action sounding in tort and those sounding in contract could not be joined. *Etchinson v. Post*, 5 Blackf. 140. The code has made no change in this respect. It is quite apparent that the first paragraph is based upon a tort, and the second upon contract, and that there was a fatal misjoinder. This is made a cause of demurrer. Code, sec. 50.

So far as any objection was made to the action of the court below, that action was correct, and free from error. The rendering of judgment for the defendant over the objection of the plaintiff would undoubtedly have been erroneous, inasmuch as the misjoinder should have been noted on the order book, and separate actions docketed, and the plaintiff should have been permitted to file complaints therein; but we have seen that he made no objection to the judgment, and asked nothing at the hands of the court.

The case comes clearly within the numerous decisions of this court, holding that a party cannot successfully complain, in this court, of the action of the court below, to which he did not object or except.

The judgment below is affirmed, with costs.

G. A. Ewing and *J. M. Vanfleet*, for appellant.

H. D. Wilson and *J. D. Osborn*, for appellee.

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COMPARET and Others v. HANNA and Others.

JUDGMENT.—*Jurisdiction.*—*Scire Facias.*—*Estoppel.*—A declaration in debt was filed in the circuit court in 1840, on the back of which was a writing signed by the defendant and dated three days prior to the filing of the declaration, to the effect that he confessed the indebtedness mentioned in the declaration, to the amount of a certain sum, and desired that judgment be rendered against him for that amount. The record stated that upon the filing of said declaration the plaintiff proved to the satisfaction of the court by oath of a person named that said “cognovit” was duly executed by the defendant, and that he was still living. And thereupon judgment was entered against the defendant for said amount. In 1845 said defendant died, and in 1849 the judgment-plaintiff sued out a *scire facias* from said court against the administrator and heirs of said decedent, which was duly served upon them, requiring them to show cause, if any they had, why execution should not be issued upon said judgment, to be levied upon certain real estate owned by the judgment-defendant at his death. The administrator and heirs failed to appear or show any cause, and the court awarded execution on said judgment, to be levied on said real estate, and execution was accordingly issued, upon which said real estate was sold by the sheriff to the agent of the execution-plaintiff.

Held, in a suit by said heirs to recover possession of said land from the grantee of the purchaser at said sheriff’s sale, that said original judgment, it being evident from the record thereof that there was neither service of process nor appearance of the defendant, in person or by attorney, was void; but,

Held, also, that said heirs were estopped by the judgment on *scire facias* from controverting the validity of said original judgment.

APPEAL from the Allen Circuit Court.

DOWNEY, J.—This was an action brought by the appellants against the appellees for the recovery of certain real estate in the city of Fort Wayne. The general denial was pleaded by the defendants, and the case was tried by the court upon an agreed statement of facts. There was a finding for the defendants, motion for a new trial overruled, and judgment on the finding. It is now here alleged as error, that the court improperly refused to grant the new trial. The new trial was asked for the reason that the finding of the court was contrary to the evidence.

By the statement of facts it was agreed that the plaintiffs were the owners and entitled to the possession of the property, unless their title had been divested by a sale of the

property on execution ; and the validity of the judgment and sale is thus brought in question.

The plaintiffs derived their title to the property by descent from Francis Comparet. On the 20th of October, 1840, a complaint in debt was filed in the Noble Circuit Court, by certain parties against said deceased and another, on the back of which was written, "I, Francis Comparet, one of the within named defendants, do confess the debt mentioned in the within declaration, to the amount of two thousand nine hundred and forty-two dollars and ninety-nine cents, and desire that judgment be rendered against me to that amount.

October 17th, 1840.

FRANCIS COMPARET."

The record says: "And thereupon the plaintiffs now prove to the satisfaction of the court, by the oath of Charles Ewing, that the said cognovit was duly executed by the said Francis Comparet, and that he is still living ; and the said plaintiffs now remit and release all claim for damages herein and waive the assessment thereof. It is therefore considered by the court now here that said plaintiffs do recover of the said Francis Comparet the sum of two thousand two hundred and forty-two dollars and ninety-nine cents, in said cognovit mentioned, and also their costs and charges in this behalf expended."

Francis Comparet died on the 15th day of February, 1845. On the 5th day of April, 1849, the judgment creditors sued out a writ of *scire facias* against the administrator and heirs of said Francis Comparet, from the Noble Circuit Court, requiring them to show cause, if any they had, why execution should not be issued upon said judgment, to be levied upon the lots in the complaint described, which writ was directed to the sheriff of Allen county, and was duly served on said administrator and said heirs, more than ten days before the next term of the Noble Circuit Court.

The administrator and the heirs failed to appear or show any cause, and the court, at the April term, 1849, awarded execution on the judgment, to be levied upon the lots in the complaint mentioned. Accordingly, execution was issued, and on the 11th of August, 1849, the property was sold, and pur-

chased by one through whom the defendants derive title. There has been no occupancy of said lots by any one under the title resulting from the sheriff's sale, but those claiming under it have paid the taxes and assessments on the lots. The purchaser at the sheriff's sale was the agent of the execution plaintiffs.

Three questions are discussed, and presented for our decision: First, was the original judgment in the Noble Circuit Court against Francis Comparet valid? Second, if it was not valid, then did the judgment on the *scire facias* authorize the sale of the lots? Third, if the sheriff's sale was invalid, then are the plaintiffs barred by the statute of limitations?

It is evident from the record in the original case, in the Noble Circuit Court, that the defendant in that case was not personally in court, and that he did not in person confess the judgment. It is equally apparent that the writing on the back of the complaint did not authorize any one to appear for him, nor does the record show that any one did appear for him. There having been neither service of process nor appearance, the court had no jurisdiction of the person of the defendant, without which no valid judgment could be rendered.

In *Hawkins v. Hawkins' Adm'r*, 28 Ind. 66, this court held that the jurisdiction of a party defendant can only be acquired by the proper service of process or notice, or by the appearance of the party in person or by attorney. No one is bound by proceedings which he has had no opportunity of defending against; and if the court has acquired no jurisdiction of the person of the defendant, its proceedings are void and cannot affect his rights. When, however, the judgment or proceedings of a court of general jurisdiction come collaterally in question, and the record discloses nothing upon the point, jurisdiction of the person, the contrary not being shown, will be presumed. See, also, *Horner v. Doe*, 1 Ind. 130; *Ferrand v. McCleave*, *id.* 87; and *Craig v. Glass*, *id.* 89.

This is not a case where the inference can be indulged that there had been service or an appearance. The record

shows no process, or the service or return thereof, and it is very evident that the defendant was not personally in court. Had he been in court, it would hardly have been necessary to prove that he had signed the paper and was still living. The facts shown exclude the idea of any such thing, and put it beyond the reach of presumption to the contrary.

Upon the question relating to the proceeding on *scire facias*, it is insisted by the appellants that the only effect of it was to revive the judgment, but not to impart to it any validity or force which it had not before; that though the defendants in that proceeding might have appeared in obedience to the command of the writ, and by the proper plea have insisted upon the invalidity of the judgment, they were not bound to do so, but might reserve the objection until the lots were sold, and then present it as they have done in this case.

We cannot concede the correctness of this position. According to the agreed statement of facts, the heirs were notified by the writ to appear, and show cause, if any they had, why execution should not be issued on the judgment, to be levied upon the very lots in question. It was not merely to revive the judgment. But the judgment defendant having died, and the title to the real estate having become vested in the heirs, the requisition was that they show cause against the issuing of the execution and its levy upon the property in question which had so descended to them.

It is not only that which the parties actually litigate, which is put at rest by the judgment, but also every other matter which they might have litigated under the issues in the cause. Whenever a matter is adjudicated, and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends; and it therefore prevails, with a very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might

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have litigated in the case, *Fischli v. Fischli*, 1 Blackf. 360; *Athearn v. Brannan*, 8 Blackf. 440.

One reason why the heirs were required by law to be notified before an execution could issue on a judgment rendered against their deceased ancestor in his lifetime, which might be levied on the real estate descended to them, was, that they might have an opportunity, among other things, to show that there was no such judgment. This, according to our opinion with reference to the invalidity of the judgment, would have been a good defense. But having failed to raise the objection at that time, it is too late for them to make it now. It seems clear from the authorities, that the defendants to the *scire facias* might have pleaded *nul tiel record* of the recovery, as well as payment, release, or satisfaction by execution. Tidd Prac. 1130.

It is also said by the same author, p. 1131, when the party has a release or other matter which he might have pleaded to the *scire facias* in his discharge, and for want of pleading it, execution is awarded upon a *scire feci* returned, he is estopped forever and cannot by any means take advantage of that matter.

It seems to us that the question is not whether the *scire facias* imparts vitality and force to the original judgment, but it is whether the defendants to the *scire facias* shall be allowed, after having been summoned into court, and thus having an opportunity to raise the question, to say now, what they might have said then, *nul tiel record*. Mr. Tidd puts it on the ground of estoppel, and we think that is the correct ground on which it securely rests.

It seems to have been held by this court, that in a case like this, the parties resisting the claim made by those claiming title under the execution cannot controvert anything behind the judgment on *scire facias*; and that it is not even necessary for the purchaser at the sheriff's sale, or those claiming under him, to show the original judgment, in order to make good their title. *Carpenter v. Doe*, 2 Ind. 465.

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It is not necessary that we should consider the third question discussed, after having held the title valid.

The judgment is affirmed, with costs.

PETTIT, C. J., dissents from that part of the opinion holding the original judgment invalid, but concurs in the residue of the opinion, and in the result.

W. M. Crane, for appellants.

R. Brackenridge, for appellees.

HAWES v. RHOADS, Administrator.

EVIDENCE.—*Revenue Stamp.*—*Recorder's Certificate.*—A certified copy of the record of a mortgage is not rendered inadmissible in evidence by the want of a revenue stamp upon the recorder's certificate, such official instruments being exempt from stamp duty.

SAME.—*Foreclosure of Mortgage.*—*Production of Note.*—In a suit by the holder of a mortgage given to secure the payment of a note, to foreclose the mortgage, no personal judgment being sought, the plaintiff need not produce the note and offer it in evidence, if it be in the possession of the defendant.

APPEAL from the Pike Common Pleas.

WORDEN, J.—This was an action by the appellee against the appellant to foreclose a mortgage executed by the latter to the plaintiff's intestate in his lifetime, to secure the payment of a note for twenty-four hundred dollars, no personal judgment being sought.

Answer of general denial, and payment. Issue, trial by jury, verdict for plaintiff, and judgment of foreclosure for the amount of seven hundred and fifty dollars.

A bill of exceptions raises the questions pressed upon our consideration.

It is claimed that the court erred, first, in admitting improper testimony; second, in giving and refusing instructions; and third, in not setting aside the verdict as being contrary to the evidence.

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On the trial, the plaintiff offered in evidence a copy of the record of the mortgage, duly certified by the proper recorder, but this was objected to by the defendant because the recorder's certificate had upon it no revenue stamp. The objection was overruled, and the certified copy of the mortgage admitted. There was no error in this ruling, as such certificates need no stamp.

By the act of Congress of July 3d, 1866, it is provided, "that all official instruments, documents, and papers issued by the officers of the United States government, or by the officers of any state, county, town, or other municipal corporation, shall be, and hereby are, exempt from taxation." The certificate of the recorder is an instrument issued by a county officer, in the discharge of his official functions as such, and comes clearly within the spirit and letter of the exempting statute. On this ground it has been held by this court that county orders were exempt from stamp duty. *Nave v. King*, 27 Ind. 356.

We come to the next point. On the trial, the note was not produced, it being in possession of the defendant. The point raised on the instructions given and those refused is, whether it is necessary in such case to produce the note and offer it in evidence. The court held it unnecessary, saying to the jury, in substance, that the holder of a mortgage given to secure the payment of a note has a double remedy; he may sue on both or either of them, and recitals in the mortgage are evidence of facts therein recited. In a case like this, where the proceeding is for a foreclosure only, the authorities are somewhat in conflict as to the necessity of producing the note. It was held to be unnecessary by this court in the case of *Arnold v. Stanfield*, 8 Ind. 323; while a different ruling seems to have been made in the following cases: *Lucas v. Harris*, 20 Ill. 165; *Moore v. Titman*, 35 Ill. 310; *Bennett v. Taylor*, 5 Cal. 502. Probably there are other cases to the same effect. The recitals in the mortgage are undoubtedly sufficient proof of the execution of the note, and there is no need of any further proof in order to fore-

close the mortgage. There are, nevertheless, some good reasons why, as a matter of practice, the court should require the plaintiff to produce the note and offer it in evidence, where it is in his possession or under his control. In the ordinary course of business, payments are frequently made upon notes secured by mortgage, and endorsed thereon, the maker preserving no evidence of such payments except the endorsements. But where, as in this case, the defendant has the possession of the note, there is no good reason why the plaintiff should be required to produce it. If it contain, by way of endorsement of payments or otherwise, any evidence to his advantage, the defendant may, in such case, avail himself of it by producing the note and offering it in evidence. There was no error committed in reference to the instructions as applied to the case, in view of the defendant's possession of the note. We put the decision of this point on the ground of the defendant's possession of the note, but do not decide that it would or would not be error to render judgment of foreclosure without producing the note where it is in the plaintiff's possession or under his control.

We cannot reverse the judgment below on the evidence, which was quite conflicting. There were two trials, both resulting the same way, though in the former the damages assessed were larger than in the latter.

The circumstance of the defendant having the note would, unexplained, be very strong evidence that he had paid and taken it up; but, on the other hand, the evidence tends strongly to show that he obtained such possession under such circumstances as would entirely remove any presumption of payment arising from such possession.

The judgment below is affirmed, with costs and five per cent. damages.

J. W. Burton, J. H. O'Neal, and F. W. Viehe, for appellant.

J. C. Denny, G. G. Reily, and J. N. Evans, for appellee.

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157	588

BOGGESS v. DAVIS.

PRACTICE.—Interrogatories.—The answers made by a party under oath to interrogatories propounded by the opposite party, as provided by section 303 of the code (2 G. & H. 189), cannot be used by the court on a motion to strike out a pleading as a sham which is good on its face. Such answers can be used only on the trial, and then only at the option of the party who has required them.

APPEAL from the Marion Common Pleas.

PETTIT, C. J.—Suit by Davis, assignee of Burnam, against Bogges, on a promissory note (not payable in bank). The defendant answered that the note was given without any consideration. Reply of general denial; and with it the following interrogatories were filed for the defendant to answer under oath:

“First. What was the consideration for which the note sued on in this action was executed?”

“Second. If the note was executed without any consideration, how came the defendant to execute it? What were the inducements therefor? Tell all about it.

“Third. Was not the note executed by the defendant on the 8th day of April, 1869, in consideration of money paid to him on the 5th of April, 1869?”

“Fourth. Was not the note executed to secure money loaned to defendant by the plaintiff’s assignor?”

To the first question, the defendant answered, “There was no consideration, as I am advised and believe. The facts are stated fully in answer to the next interrogatory.”

To second interrogatory, the defendant answered, that on or about the 5th day of April, 1869, defendant bargained to one L. W. Burnam, the payee of said note, a farm in Shelby county, of the value of about seven thousand dollars; that defendant was to receive therefor about fifteen hundred dollars in money, and certain wild lands in Indiana, Minnesota and Wisconsin; that said Burnam fraudulently and falsely represented that he had a good title to said wild lands, and that the same were good lands; that defendant had never seen said lands, and relied on said representations; that after

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defendant had conveyed said Shelby county farm to said Burnam, he ascertained that said Burnam had no title, at least to many of said lands, that the same had been sold for taxes; and that the defendant had been grossly defrauded in said trade; that the defendant demanded a rescission of said trade of said Burnam, which he refused; that defendant executed said note to procure a rescission of said fraudulent and pretended title of said Burnam to said Shelby county farm, and for no other consideration; that by reason of said fraud and said demands for a rescission, said Burnam had no title; and so defendant says there was no consideration for said note.

The third interrogatory was answered, "no"; and the same answer was given to the fourth interrogatory. Thereupon the plaintiff withdrew his reply to the defendant's answer, and moved the court to strike out the defendant's answer, "because the same is a sham, as shown by the defendant's answers under oath to the interrogatories of plaintiff filed herewith;" and moved the court upon said answer being stricken out, to render judgment in his favor, for the amount of the note and interest sued upon in this action. And the court sustained said motion, and defendant excepted; and the court thereupon rendered judgment for the amount of the note and interest (five hundred and twenty-four dollars), to which the defendant excepted, and prayed an appeal; which was granted, &c. The errors assigned are, first, that the court erred in striking out the answer; second, that the court erred in rendering judgment in favor of the plaintiff.

The answer was not sham on its face, nor do we think that the answers of the defendant to the interrogatories show it to be so, even if the court could have looked into them *before* the trial, but which we think could not have been done till the trial, and then only at the option of the party requiring them. 2 G. & H. 189, sec. 303.

In sustaining the motion of the plaintiff to strike out the defendant's answer, the court erred, and for it the judgment must be reversed.

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Judgment reversed, at the costs of the appellee. Cause remanded for further proceedings.

ON PETITION FOR A REHEARING.

PETTIT, C. J.—The only question of any importance decided in this case is, that answers to interrogatories cannot be used by the court on a motion to strike out an answer as a sham, which is good on its face. The answers can only be used on the trial. 2 G. & H. 189. sec. 303. Since deciding this case we have again had this question before us, and have reaffirmed the same doctrine, and are satisfied with it.

The petition is overruled.

A. G. Porter, B. Harrison, and W. P. Fishback, for appellant.
J. S. Harvey, for appellee.



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HANNA and Another v. SHIELDS.

VENDOR AND PURCHASER.—*Title.—Mortgage.—Foreclosure.*—In a suit on a note and to foreclose a mortgage on real estate executed to secure said note given for unpaid purchase-money of said real estate, an answer, pleaded in bar of the whole cause of action, alleging an entire want of title in the vendor, is bad on demurrer, such want of title being at least no defense to the foreclosure of the mortgage.

SAME.—*Purchase-Money.*—The fact that the vendor of real estate conveyed by warranty deed had a title to only a portion of said real estate at the time of said conveyance by him and has not since acquired a title to the remainder, is not a good defense to an action against the vendee in possession under said deed, to recover unpaid purchase-money.

RESCISSION.—An application for the rescission of a contract is addressed to the discretion of the court, and will not be granted when the parties cannot be placed *in statu quo*. When one seeking to rescind has derived benefit under the contract, he must reconvey, refund or give up to the other party all such benefit. If he has had the valuable use of property, he must offer to account for this profit. And it must affirmatively appear that he has acted promptly in availing himself of his right to rescind.

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APPEAL from the Sullivan Circuit Court.

DOWNEY, J.—This was an action to foreclose a mortgage executed to secure the payment of two promissory notes, given for a part of the price of certain real estate, by the appellant Burton G. Hanna to Crowder, and by him endorsed to the plaintiff below.

Answer: first, no consideration; second, failure of consideration; third, this paragraph having been withdrawn, no question arises in reference to it; fourth, an answer and cross complaint praying that Crowder be made a party, and for a rescission of the contract; fifth, nearly similar to the fourth, and having the same prayer.

A demurrer was filed and sustained to the second and fourth paragraphs of the answer, and exception. Thereupon, without any reply to the second and fifth paragraphs of the answer, there was a trial by the court, and finding and judgment for the plaintiff.

There was no motion for judgment *non obstante veredicto*, nor for a new trial.

The first question is with reference to the sufficiency of the second paragraph of the answer. It alleges, that, at the time of the execution of said notes and mortgage, the maker of the notes purchased of Crowder, the payee, the premises mentioned in the mortgage; that he conveyed the same by warranty deed; that he was to convey a perfect title in fee simple; and that the consideration for the notes and mortgage had failed, because Crowder did not convey to Hanna, nor did he then possess, nor has he since acquired, a perfect title to said land, but the title was in another party.

If for no other reason, this paragraph of the answer was bad because it was pleaded in bar of the action generally, and not in bar of a personal judgment only. It is decided by this court in *Rogers v. Place*, 29 Ind. 577, that an allegation of an entire want of title in the vendor is no defense to the foreclosure of the mortgage given to secure the purchase-money. See, also, *Hubbard v. Chappel*, 14 Ind. 601. The demurrer to this paragraph was rightly sustained.

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In the fourth paragraph, which is also a cross complaint, the defendant alleged, that, before the execution of the mortgage and notes, Crowder occupied and pretended to own the property mentioned in the mortgage, and offered to sell the same to the defendant, and fraudulently and falsely represented to him that he had a good and perfect title to the same, and Hanna then agreed to give Crowder one thousand dollars therefor, that being the full value of the lot and improvements; that Crowder did not then furnish an abstract of the title, nor did Hanna investigate the same, but, relying on the representations, paid him five hundred dollars, and received a general warranty deed, and executed the mortgage and notes for the balance of the purchase-money, and entered into the possession of the premises, on which were situated a dwelling house and an unfinished well, which well the defendant finished, and he built a wood-house, stable and coal-house on the premises, and made sidewalks and other improvements thereon, to the value of three hundred dollars, and paid taxes to the amount of fifty dollars; that after this he was informed that Crowder had not, at the time of making the contract, nor has he since acquired, any title whatever to the one undivided third part of said lot, but that the same was in another party, all of which was well known to Crowder and fraudulently concealed at the time of making the contract; that the lot was, as Crowder knew, purchased by defendant for a residence, and is small for that purpose, and is not susceptible of division by cutting off the one-third part thereof without destroying its utility for the purpose aforesaid and greatly injuring the dwelling house; that upon discovering the defect of title, the defendant proposed to said Crowder, before he transferred the notes, that he would rescind the contract and redeliver to him the possession of the property, and reinvest in him the title thereto, if he would surrender the notes and mortgage, and repay the amount already paid on the purchase-money, and one hundred dollars for expenditures aforesaid, which Crowder refused to do. And the paragraph says the de-

fendant now brings into court a deed for said lot, which was filed with the answer, and again offers to deliver the same and the possession of said lot to said Crowder upon such terms as are equitable and just, and such as the court may decree, and prays the court to decree a rescission of the contract, that the notes and mortgage may be surrendered up, &c., that Crowder be made a party and compelled to repay the money already paid to him, &c.

This paragraph sought for equitable relief. An application for the rescission of a contract is addressed to the discretion of the court, and will not be granted except where the parties can be placed *in statu quo*. Where the party seeking the relief has received a benefit under the contract he must reconvey, refund, or give up to the other party the benefit so acquired. He must also act promptly in availing himself of the right to rescind.

It is not considered necessary to cite authorities to sustain these propositions. They are too well settled. The deed was received by the appellant and bears date, as do also the notes and mortgage, May 19th, 1866. It is alleged, that, upon discovering the defect in the title, the defendant proposed to rescind, and that this was before the assignment of the notes; but when the notes were assigned is not alleged. The deed made to reconvey the property bears date March 12th, 1868, the day after the filing of the answer and cross complaint, filed March 11th, 1868. We are thus unable to see, from anything alleged in the answer and cross complaint, when it was proposed by the defendant to rescind. It was at some time between the date of the execution of the notes and the time of commencing the action, February 19th, 1868. We cannot say that there was that degree of diligence which is required in such cases. This should affirmatively appear. And again, it appears that the defendant went into possession of the premises at the date of the conveyance to him, and that there was a dwelling house on the lot, the use of which we must presume was worth something during the period of time from the date of the deed until the offer to rescind; and

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there was no offer to account for this advantage or profit at the time when it was proposed to rescind. That this was necessary, appears from the following cases: *Osborn v. Dodd*, 8 Blackf. 467; *Hardesty v. Smith*, 3 Ind. 39; *Cooley v. Harper*, 4 Ind. 454; *Shaeffer v. Sleade*, 7 Blackf. 178. We think a case for rescission is not shown.

It does not follow that the party is without remedy. We have examined the pleading and the authorities with a view of seeing whether it can be regarded as a defense, in whole or in part, to the plaintiff's action, but we think it cannot be so regarded. It is claimed by the attorney of the appellant, that the covenant of seizin is broken the moment it is made, if the grantor has no title. This may be conceded, but still it does not appear that in this case the grantor had no title. He had a valid title to two-thirds of the lot, and he put the grantee into possession of the whole of it. And though the grantee may claim that the covenant is broken when there is no title, he can recover only to the extent of the damage which he has sustained. And, supposing that he has not been disturbed in the possession and enjoyment of the property, can it be said that he has suffered more than nominal damages? Suppose no one shall ever disturb him in the possession of the property, shall he hold the property, and yet not pay for it? We are referred by the appellant to *Traster v. Snelson's Adm'r*, 29 Ind. 96, but in this case the court say, "the paragraph shows a breach of the covenant of seizin, and a right to a recovery of *full damages*." This was a case where the right which the party had stipulated for, which was the right to increase the height of a mill-dam, was of such a nature that he was not in the possession of it, nor was it in the power of the other party to give it to him. It was not a case where the party had received and was in the possession of all that he had contracted for. On the proposition, that for a breach of the covenant of seizin without eviction, only nominal damage can be recovered, and when set up as a defense, only a nominal amount can be allowed, see the following cases: *Stevens v. Evans' Adm'r*, 30 Ind.

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39; *McClerkin v. Sutton*, 29 Ind. 407; *Jordan v. Blackmore's Adm'r*, 20 Ind. 419; *Van Nest v. Kellum*, 15 Ind. 264; *Small v. Reeves*, 14 Ind. 163.

As to the other questions, there having been no motion for judgment *non obstante*, nor any application for a new trial, they are not before this court for decision. Such questions cannot be raised in this court for the first time. See *Preston v. Sandford's Adm'r* 21 Ind. 156, and cases there cited.

The judgment is affirmed, with one per cent. damages and costs.

J. M. Hanna, for appellants.

S. Coulson, for appellee.

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STINSON v. MINOR.

CHATTEL MORTGAGE.—*Vessel of United States*.—Where before a vessel has been registered or enrolled as a vessel of the United States, a mortgage is executed thereon and duly recorded according to the law of this State, it will be valid against a person purchasing such vessel, for value and without actual notice of the mortgage, after the vessel has been enrolled in the office of the surveyor of a port of delivery, although the mortgage be not recorded in said office.

APPEAL from the Vanderburgh Circuit Court.

PETTIT, C. J.—This was an action by Henry J. Minor against the appellant, Hall, Rudd, and Maghee, for the foreclosure of a chattel mortgage.

The complaint charges, that on the 7th day of December, 1862, the defendants Hall and Rudd, and D. W. Ellithorp & Co., were the owners of the steamer Curlew, then lying at the Evansville wharf; that on the same day, to secure certain notes, of which copies are filed with the complaint, said owners of said boat mortgaged the same to the plaintiff; that the mortgage, of which a copy is filed, was duly exe-

cuted and acknowledged by the mortgagors, and recorded in the recorder's office of Vanderburgh county, within ten days from the making of the same; that in a proceeding under the laws of the State of Illinois, in 1864, said steamer was, by the city marshal of the city of Cairo, in said State of Illinois, sold at said city, at public auction, to defendant Maghee, who had full knowledge of the existence of the mortgage, and that the notes were unpaid; that said steamer, afterwards, from 1865 to 1867, was, at different times, owned by defendant Stinson and others; that in 1867, the boat was sunk and wrecked; that the machinery, boilers, etc., were taken from the boat, and are now in the county of Vanderburgh, and are of the value of fifteen hundred dollars; and that defendant Stinson claims them. Prayer for judgment against Hall, Rudd, and Maghee, for the amount of the notes, etc., and for a foreclosure of the mortgage.

The mortgage set out as an exhibit purports to be signed and acknowledged by "John B. Hall & Co." and "D. W. Ellithorp & Co."

There was a suggestion of non-service and a continuance as to Maghee, and a default as to Hall and Rudd. Stinson answered in two paragraphs. In the first, he alleged, that at the time of making the mortgage in suit, the Curlew was a regular passenger packet navigating the Ohio river and its tributaries; that the same was subject to be and was regularly licensed and enrolled in the office of the collector of customs for the city of Evansville; that said mortgage was never recorded in said office, in accordance with the provisions of the statutes of the United States in such cases made and provided; that long after the making of the mortgage, defendant Maghee, being in possession of said Curlew, sold the same to defendant Stinson, one McDonald, and one Thomas, for three thousand dollars, which was the full value thereof; that at the time of said sale, neither of said purchasers had any notice of said mortgage; that subsequently, defendant Stinson bought out the interest of McDonald and Thomas in the boat, which had been wrecked, and is now

sole owner of the wreck; and that he is an innocent purchaser without notice or knowledge of the mortgage. The second paragraph of the answer is a general denial. A demurrer to the first paragraph of the answer was overruled, and the plaintiff excepted.

The plaintiff replied to the first paragraph of the answer, the general denial.

There was a trial by the court; finding for the plaintiff. A motion for new trial, by Stinson, assigning for cause that the finding was contrary to law, and not sustained by sufficient evidence, was overruled; and judgment was rendered against Hall and Rudd for the amount of the notes, with a decree directing the sale of the wreck of the boat. Stinson excepted to the overruling of the motion for a new trial and the rendition of the decree of foreclosure, and prayed an appeal, and now assigns for error the rulings so excepted to.

The evidence is all in the record. It consists of the mortgage and notes, and evidence showing, in brief, that prior to and including the summer of 1862, the steamboat Curlew was owned by one Semonin, and used for the carrying of freight and passengers from Evansville, Ind., to Henderson, Ky.; that early in the fall of 1862, she was purchased by J. B. Hall & Co. and D. W. Ellithorp & Co.—the former firm owning one-third, and the latter two-thirds; that immediately after the sale to these parties, she was placed upon the ways at Evansville, for the purpose of putting a cabin on her, as she never had any regular cabin; that on the 7th day of December, and while the boat was still on the ways, the mortgage sued on was executed; that Ellithorp was not present at the execution of the mortgage; but that Brigham, his partner, executed and acknowledged the mortgage in the firm name of D. W. Ellithorp & Co.; that the firm was composed of Ellithorp and Brigham, who were partners in business, neither of whom then, nor ever before or after, lived in this State; that as soon as the cabin was on the Curlew, and she was ready for navigation, to wit, on the 27th day

of December, 1862, she was duly enrolled in the office of the surveyor and collector of customs at the port of Evansville; that she then went into the government service; was south some time, and returning, was sold at marshal's sale, under state process, at Cairo, Ill.; and Maghee became the purchaser; that he immediately had her duly enrolled at the port of Evansville, and afterwards sold her to defendant Stinson and others who wrecked her; that Stinson has since become by purchase sole owner of the wreck; that the same is within the county of Vanderburgh, and is valued at fifteen hundred dollars; and that neither Maghee nor any one of the parties purchasing from him had any notice or knowledge of the mortgage at the time they became purchasers respectively, nor until the commencement of this suit; and none of them ever looked at the records of Vanderburgh county.

The main point relied on for a reversal of the judgment of the court below is, that the mortgage was not recorded in accordance with the provisions of the act of Congress approved July 29th, 1850, 9 Stat. at Large, 440.

The first section of the act provides: "That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs, where such vessel is registered or enrolled: Provided, that the lien by bottomry on any vessel created during her voyage, by a loan of money or materials, necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority, or be in any way affected by the provisions of this act."

The second section provides, "that the collector of customs shall record all such bills of sale, mortgages, hypothecations, or conveyances, and all certificates for discharging and canceling any such conveyances, in a book or books to

be kept for that purpose, in the order of their reception; noting in said book or books, and also on the bills of sale, mortgages, hypothecations or conveyances, the time when the same was received, and shall certify on the bill of sale, mortgage, hypothecation or conveyance, or certificate of discharge or cancellation, the number of the book and page where recorded; and shall receive for recording such instrument of conveyance or certificate of discharge, fifty cents."

The appellant has assigned for error, first, the overruling his motion for a new trial; second, the foreclosure of the mortgage and the rendition of the decree for the sale of the mortgaged property.

The appellee has assigned as cross error, the overruling of his demurrer to the first paragraph of the appellant's answer. These questions are properly before us for consideration.

The substance of the first paragraph of the answer is, that at the time of making the mortgage in suit, the Curlew was a regular passenger packet navigating the Ohio river and its tributaries; that the same was subject to be, and was regularly licensed and enrolled in the office of the collector of customs for the city of Evansville; that said mortgage was never recorded in said office, in accordance with the provisions of the statute of the United States, in such cases made and provided.

We think the demurrer should have been sustained; but whether we are right or not in this view, can make no difference in the result of this case; for the finding of the facts by the court and the evidence in the case, both of which are in the record, show that the mortgage was given and recorded in the office of the recorder of Vanderburgh county (the proper one), before the vessel was licensed, registered, or enrolled by the surveyor of the port of delivery of Evansville, which, if valid under the laws of the United States, could not defeat the mortgage executed and recorded under the laws of the State, while the vessel was a mere chattel, and before it had risen to the dignity of a "vessel of the ✓

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United States" by registry and enrollment. The court committed no error against the appellant.

The judgment and decree are affirmed, with costs.

A. Iglehart, for appellant.

M. R. Anthes, A. Dyer, and C. H. Mann, for appellee.

 THOMPSON v. WILSON.

DEPOSITION.—*Official Character of Officer Before Whom Taken.*—A deposition taken in another state to be used in evidence in this State is invalid and should be suppressed on motion, if taken before any other than an officer authorized by our laws to take depositions, whether the officer before whom it was taken was so authorized by the laws of such other state or not, and although the party making the motion had waived *dedimus* and certificate of the official character of the officer, and appeared at the taking and offered no objection then to the official character of the officer.

SAME.—Notice to take depositions in another state, "before some officer authorized to administer oaths." The party to whom notice was given waived *dedimus* and certificate of the official character of the officer before whom the depositions should be taken. The depositions were taken before one who certified that he was "a commissioner in chancery for the circuit court," &c.

Held, on motion to suppress, that the depositions were void for want of authority in the officer who took them.

EVIDENCE.—*Presumption as to Improper Evidence.*—Where material evidence has been improperly admitted, it will be presumed that it influenced the verdict, unless the contrary clearly appear.

APPEAL from the Henry Common Pleas.

BUSKIRK, J.—This was an action brought in the court below, by the appellee, against the appellant and one John Bumbgardner, on a promissory note executed by Thompson and Bumbgardner. Bumbgardner was not served with process, and did not appear. The appellant appeared and denied, under oath, the execution of the note by him. There was a jury trial, resulting in a verdict for the appellee. A motion for a new trial was made and overruled, and exception taken.

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The appellant, at the proper time, moved the court to suppress the depositions of Henry C. Potest, A. L. Wilson, and G. F. Miller, because the same were not taken by and before any officer authorized by the laws of Indiana to take depositions; which motion was overruled, and exception was taken. The motion, ruling of the court, and exception, are shown by a bill of exceptions. The appellant objected to the admission of said depositions in evidence, on the trial of the cause, but the objection was overruled, and the depositions were read as evidence on the trial, to which appellant excepted. The refusal of the court to suppress the depositions, and their admission in evidence were assigned as reasons for a new trial. The evidence is in the record.

The only error that is insisted on and discussed by the appellant in this court, is the ruling of the court in overruling the motion to suppress the depositions, and all others will be regarded as waived.

The appellee insists that the appeal should be dismissed, because the appellant's abstract does not comply with rule ten of this court. There is nothing in the objection. The abstract contains a brief statement of the issues, the trial, and the motion for a new trial. It then copies the motion to suppress, the notice to take depositions, the acknowledgment of service, and the certificate of the officer taking them. This abstract is sufficient to present the error relied on, but not any other question in the case. In *Chapin v. Clapp*, 29 Ind. 611, GREGORY, J., defined what was a good abstract. In his very learned and elaborate definition, he says:

"It is not, however, required by the rule that the abstract should be of the entire record, but only of so much thereof as is necessary to present the errors assigned and relied upon for the reversal of the judgment."

The notice was to take the depositions at the office of T. B. Kline, Esq., at Cabell Court House, in the county of Cabell, and State of West Virginia, *before some officer authorized to take depositions*. The appellant entered on the notice an acknowledgment in these words: "We acknowledge service

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of the above notice, and waive *dedimus* and certificate of official character of officer before whom said depositions are taken." The depositions were taken before Joseph S. Miller, who certifies that he was *a commissioner in chancery* for the circuit court of the county of Cabell, and State of West Virginia. Our statute provides, that "depositions of witnesses, taken within or without this State, may be taken * * * before any judge, justice of the peace, notary public, mayor or recorder of a city, clerk of a court of record or commissioner appointed by the court to take depositions." 2 G. & H. 173.

This statute is in derogation of the common law, and its provisions must be substantially complied with. 1 Greenl. on Ev. sec. 323; *Bell v. Morrison*, 1 Pet. 351. The depositions were taken by and before an officer unauthorized by the laws of this State. The commissioner in chancery may have been authorized by the laws of West Virginia to take depositions, but we cannot take judicial notice of the laws of another state; and even if he was so authorized, it would not render the depositions valid, unless he was one of the officers authorized by our laws. The depositions were void for the want of authority in the officer who took them. But it is claimed that the acknowledgment of service waived the official character of the officer. We do not think so. It merely waived a certificate of his official character, and not that he should be an officer who was authorized to take depositions. If the depositions had been taken before some person who had no seal, it would have been necessary, in the absence of an agreement or a waiver like the one in this case, for some officer who had a seal to certify to the official character of the officer before whom the depositions had been taken, unless the name of the officer is put in the commission. The appellant waived this certificate and a commission, and nothing else.

It is also claimed that, as the appellant appeared at the taking of the depositions, and waived an objection to the official character of the officer, that he is now estopped from doing so. The only effect of his appearance without objection,

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was to waive the sufficiency of the notice as to time. *The President, &c.*, v. *Wadleigh*, 7 Blackf. 102.

The court erred in overruling the motion to suppress the depositions, and in permitting them to be read in evidence on the trial of the cause. But the appellee has earnestly insisted that we should not reverse the case for such erroneous ruling, for the reason that if the depositions had not been read in evidence, the jury would have found the same verdict they did. In other words, that the other evidence in the record was sufficient to justify the verdict. We have examined the evidence in the record, and while we might not reverse the case, if it came here upon the other evidence, excluding that contained in the depositions, we are not prepared to say that the evidence contained in said depositions did not influence the jury; it would be very dangerous for this court to undertake to determine what evidence did or did not influence the jury. It is enough for us to know that illegal evidence was admitted. The evidence of Mr. Potest was very important; and, among other things, he testified to admissions made by the appellant in reference to the note sued on, and as to payments made on such note by appellant. This court, in the case of *Morgan v. The State*, 31 Ind. 193, in speaking of the admission of illegal evidence, say, "This error having occurred, did it harm the appellant? The presumption is that it did; and unless it clearly appears that it did not, we must reverse the case." See *Peterson v. Hutchinson*, 30 Ind. 38; *The Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335. In *Belden v. Nicolay*, 4 E. D. Smith 14, the court say, "But when illegal evidence is, in fact, received, and the return states, in terms, that the finding of the court below is upon consideration of all the evidence given upon the subject, we are not at liberty to disregard the error. In such case it not only appears that the improper testimony may have influenced the court in its finding upon the facts, but that it did so." We think that it is quite clear that the appellant was entitled to a new trial, and that the court erred in refusing it.

Mullendore and Another *v.* Silvers and Another.

Judgment reversed ; and cause remanded, with directions to the court below to grant a new trial, and for further proceedings not inconsistent with this opinion.

J. H. Mellett and M. E. Forkner, for appellant.

J. B. Martindale, J. Brown, and R. L. Polk, for appellee.

MULLENDORE and Another *v.* SILVERS and Another.

PRACTICE.—Suit on Joint Contract.—Judgment.—Motion to Set Aside Judgment.—In an action against A. B. and C. on their joint note, all the defendants having appeared, A. and B. were defaulted; whereupon, without any issue of fact as to C. or further notice of him than overruling a demurrer filed by him to the complaint, final judgment was taken against A. and B. alone, on their default. Afterwards, during the term, A. and B. appeared and made a motion in writing to set aside the default and judgment, assigning therein as cause, that the proceeding of the court in rendering final judgment against them was irregular and contrary to law; and they stated verbally to the court (as shown by bill of exceptions) the particulars of the irregularity and illegality of the proceeding.

Held, that the judgment against A. and B. was erroneous.

Held, also, that the objection to the judgment was sufficiently brought to the attention of the court. In such case the motion need not be in writing.

SAME.—Motion Embracing Independent Matters.—Where a motion to set aside a default and the judgment rendered thereupon is well taken as to the judgment, but not as to the default, it should be sustained as to the judgment and overruled as to the default only.

APPEAL from the Cass Common Pleas.

WORDEN, J.—This was an action by the appellees against the appellants, John H. and Abraham Mullendore, and one Samuel Mullendore, upon a joint promissory note purporting to be executed by all three of them. Service of process was had on Samuel, and the other two defendants waived service and appeared to the action.

Samuel demurred to the complaint. Pending the demurrer, John H. and Abraham were called and defaulted. The demurrer of Samuel was then overruled. Without ruling

him to answer over, or taking any further notice of him, the record proceeds as follows: "And the court do now, upon hearing proof, say and find that the plaintiff's cause of action in this behalf is founded on a promissory note which is capable of being reduced to a certainty by calculation, and that there is due the plaintiffs thereon the sum of five hundred and sixty dollars and forty-six cents," &c., "together with all costs herein accrued, collectable without relief," &c., "from the said defendants John H. Mullendore and Abraham Mullendore." Then follows a judgment in favor of the plaintiffs against John H. and Abraham.

It may be observed, though it is perhaps not important to the decision of the question involved, that it appears by the answer of Samuel to interrogatories filed, that he was the principal in the note, and the appellants herein his sureties.

Afterwards the appellants appeared, at the same term of the court, and moved the court to set aside the default and judgment against them, "and for cause say that the proceedings of the court in rendering final judgment against them are irregular and contrary to law." This quotation is from their written motion. A bill of exceptions shows that they urged upon the consideration of the court the circumstance "that they were joint and not several contractors with the said Samuel Mullendore on the contract sued on, and that they were only liable jointly; that all the parties being then in court, the court erred in severing the cause of action and rendering a several judgment against them without a trial of the liability of all the parties." The motion was overruled, and the appellants excepted.

The appellants assign error upon the overruling of the motion to set aside the judgment against them.

Was the final judgment against the appellants, under the circumstances, rightfully rendered? This question, in our opinion, must be answered in the negative.

The makers of the note, if liable at all, are only jointly liable, unless, indeed, there is some matter that goes to the personal discharge of some of them.

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The provisions of our code have, in some measure, modified the common law, but none of them authorize the course pursued by the court below. Sections forty-one and forty-two, 2 G. & H. 65-6, do not, because here the parties were all in court, and there was no occasion to proceed against a part only; and because, the parties all being in court, it was not a case where, if the appellants had been sued severally, the plaintiffs would have been entitled to judgment, inasmuch as they were jointly, and not severally, liable. The same observations may be applied to sections 362, 366, 368, and 369, *id.* 216, 217, and 218.

The proper course to have pursued was, after the default was taken against the appellants, to have withheld final judgment against them until the cause was ready, in some way, for final judgment as to Samuel. If he had pleaded a matter that went to the merits of the action, and had succeeded therein, it would have discharged the appellants, notwithstanding their default. *Sutherlin v. Mullis*, 17 Ind. 19. The course pursued ended the case as to Samuel, and put him out of court. *Rose v. Comstock*, *id.* 1. The appellants were entitled to have the judgment in the cause rendered against them and Samuel jointly, and not against them alone, unless it was in some way established that he was not liable on the contract, and that they were.

But it is argued by counsel for the appellees, that "what evidence was offered we do not know, for it is not in the record. There might have been a state of facts in which it would have been proper for the court to render judgment against the appellants, and not against Samuel."

This reasoning would have force if an issue had been formed and the cause tried as to Samuel, and there had been a verdict or finding in his favor. But as there was no answer put in by Samuel, nor any steps taken as against him after his demurrer to the complaint was overruled, but a judgment taken against the appellants on their default, the reasoning is destitute of any force.

Again, it is urged that the motion of the appellants to set

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aside the judgment was not sufficiently definite and explicit to bring to the attention of the court the objection to the judgment. The written motion, we have seen, assigns as cause, "that the proceedings of the court in rendering final judgment against them are irregular and contrary to law." The bill of exceptions shows that the appellants fully and explicitly stated the particulars of the irregularity and illegality of the proceeding. This was amply sufficient. We are not advised of any rule of law, or of practice, that requires a written motion in such case to be more specific, or that such motion should be in writing at all.

Again, it is urged that the motion was too broad, it being to set aside the default as well as the judgment, and therefore, that it was correctly overruled *in toto*. Motions of this character, embracing matters that are separable and independent, as to some of which the motion is well taken, and as to others not, should not be overruled entirely, but only so far as they are not well taken. Thus, it is quite common to move to strike out different questions and answers in depositions, and the motion to be sustained as to some and overruled as to others. So a motion is frequently made to strike out different parts of pleadings, and the motion is sustained as to some parts and overruled as to others. They are not like an instruction to a jury, which must be good as a whole or it cannot be given. We do not think the appellants can well be told that because they asked too much, the law denies them that to which they would otherwise be entitled. The law, as we think, is not guilty of such frivolous technicality.

The court below erred in not setting aside the judgment against the appellants on their motion.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to proceed in accordance with this opinion.

S. T. McConnell and *M. Winfield*, for appellants.

A. M. Flory, *A. G. Porter*, *B. Harrison*, and *W. P. Fishback*, for appellees.

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HERETH and Another v. YANDES.

RES ADJUDICATA.—Pleading.—Suit on a note governed by the law merchant, by an indorsee against the maker. Answer setting up that the note was obtained by the payee from the maker by fraud, and that the plaintiff had notice thereof. Supplemental reply, that in a cause pending in the same court, wherein the same persons were parties, founded on a promissory note given by the same maker payable to the same payee, given at the same time and as a part of the same consideration, and upon the same transaction, and for the same purpose, and indorsed to the plaintiff by the same indorser, at the same time and upon the same consideration as the note sued on in this case, issue was formed between the parties, in which the defendant set up, in effect, the same defense as in this suit, and the plaintiff pleaded, in effect, the same replies, and said cause was submitted to the finding and verdict of a jury on final hearing and trial, and the jury found for the plaintiff, and the court rendered judgment on the verdict; a copy of the record in said former suit being made part of this reply, the allegations of which it sustained.

Held, that this reply was good on demurrer.

APPEAL from the Marion Civil Circuit Court.

DOWNEY, J.—This was a suit on a promissory note similar to that in *Hereth v. Meyer*, at this term, 33 Ind. 511, executed at the same time and for the same consideration. Hartwell, the payee, indorsed it to one Lobdell, who indorsed it to the plaintiff below.

The only question raised by the assignment of errors is that relating to the overruling, by the circuit court, of a demurrer to the reply.

The defendants having set up, in their answer, as a defense, that the note was obtained from them by the payee by fraud, and that the plaintiff had notice thereof, the plaintiff replied that in a cause pending in the same court, wherein the same persons were parties, founded on a promissory note given by the same persons, payable to the same person, given at the same time, and as a part of the same consideration, and upon the same transaction, and for the same purpose, and indorsed to the plaintiff by the same indorser, at the same time and upon the same consideration as the note sued on in this case, issue was formed between the parties, in which the defendants set up, in effect, the same defense as in this suit,

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and the plaintiff pleaded, in effect, the same replications, and the said cause was submitted to the finding and verdict of a jury, on final hearing and trial, and the jury found for the plaintiff; and that the court rendered judgment on the verdict. A copy of the record in the former suit is made part of the reply, and shows that the same questions had been fully tried and determined, in a suit on another of the same lot of notes, between the same parties. We see no reason why the ruling of the circuit court on the demurrer was not correct.

The judgment is affirmed, with two per cent. damages and costs.

McDonald, Roache & McDonald, P. W. Bartholomew, and Porter, Harrison & Fishback, for appellants.

L. Barbour and C. P. Jacobs, for appellee.

HERETH and Another *v.* YANDES.

APPEAL from the Marion Civil Circuit Court.

DOWNEY, J.—This was an action on a note, of the same date and form as the one in the case of the same appellants against Meyer, at the present term (33 Ind. 511).

The same defense was set up. There was a general verdict for the appellee, and a special finding also, in which the plaintiff was found to be an innocent holder of the note.

Judgment was rendered on the verdict. Motion for a new trial overruled. No bill of exceptions. There is nothing in the case for us to decide.

The judgment is affirmed, with two per cent. damages and costs.

McDonald, Roache & McDonald, Porter, Harrison & Fishback, and *P. W. Bartholomew*, for appellants.

L. Barbour and C. P. Jacobs, for appellee.

Baker v. The State.

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171 645

CRIMINAL LAW.—*Venue.—Time.*—There can be no conviction under an information for an assault, where the State fails to prove any time or place of the commission of the offense.

APPEAL from Putnam Common Pleas.

BUSKIRK, J.—The appellant was prosecuted in the court below for having committed an assault upon the person of Thomas W. Batman. There was a trial by jury; verdict against appellant. A motion for a new trial was made and overruled, and exception was taken. Judgment was rendered on the verdict. The affidavit and information charge that the offense was committed in Putnam county, in the State of Indiana, on or about the 10th day of September, 1869. The evidence is in the record, and we have examined it with care, and have been unable to find any evidence tending to show when or where the offense was committed. Before the appellant could have been convicted, it was necessary for the State to prove that the offense had been committed in the county of Putnam, and within two years before the commencement of the prosecution.

The appellant also complains of the instructions given by the court of its own motion, and of the refusal of the court to give certain instructions asked by him. As the case will have to be reversed for the failure of the State to prove the time when and the place where the offense was committed, we have not examined the errors assigned upon the giving and the refusal to give the instructions complained of.

Judgment reversed, and the cause remanded for a new trial.

S. Claypool and L. P. Chapin, for appellant.

B. W. Hanna, Attorney General, for the State.

Carey and Others v. The State, on the Relation of Farley.

CAREY and Others v. THE STATE, on the Relation of FARLEY.

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161	581
•161	582

COUNTY CLERK.—*Tender.—Principal and Surety.*—The sureties upon the official bond of a clerk of the circuit court are not liable for money paid into open court and handed to the clerk with an answer of tender and for the purpose of keeping the tender good, and for which the clerk as such gives his receipt, there being no order of the court in reference to the money.

APPEAL from the Hamilton Circuit Court.

PETTIT, C. J.—This was a suit on the official bond of the late clerk of the circuit court of Hamilton county, against the sureties only, the clerk being dead. Appellants demurred to the complaint, because it did not state facts sufficient to constitute a cause of action against them. Demurrer overruled; refusal to answer; trial by the court; finding and judgment for the appellee.

The only question presented for our consideration is this: Are the sureties liable for money paid into open court and handed to the clerk with an answer of tender and for the purpose of keeping the tender good, and for which the clerk gave his receipt as such? There was no order of the court in reference to the money.

This case was taken up by us some weeks since, and not seeing our way clear at the first examination, it was passed by for a further and better consideration, with an earnest desire to arrive at the law of the case in this State; and however clear we are that the sureties in such case ought to be liable, we are constrained to come to the conclusion that they are not. We need not enter into a long discussion of this question. The clerk is a creature of the State constitution, but his duties are defined only by statute. His bondsmen were presumed to know the law fixing their liability, when they executed the bond, and they have a right to its protection, whether they did or did not in fact know it. There is no law in this State rendering the sureties liable in such a case there being no law making it the duty of the clerk to receive such money. The court erred in overruling the demurrer to the complaint.

Wills v. Wills.

Judgment reversed, at the costs of the appellee. Cause remanded, &c.

J. & W. O'Brien, T. J. Kane, and A. F. Shirts, for appellants.

D. Moss and W. Wallace, for appellee.

WILLS v. WILLS.

PLEADING.—*Implied Promise.*—Under our code, where a complaint for use and occupation of real estate alleges facts from which the law will infallibly imply a promise to pay for such use and occupation, it is not necessary that it should allege a promise or an indebtedness.

PARENT AND CHILD.—*Occupation of Real Estate by Permission.*—Where a son, in consideration of natural love and affection, permits his mother to occupy real estate owned by him, without any agreement or understanding that she shall pay rent, the law will not imply a promise by her to pay rent.

APPEAL from the Vanderburg Circuit Court.

DOWNEY, J.—This action was brought by the appellee against the appellant. The complaint, as amended, alleges that the defendant had occupied the house and lots of the plaintiff, to wit, lots numbered one and two in block number fifty, in the eastern enlargement of the city of Evansville, county of Vanderburgh, and State of Indiana, by permission of the plaintiff, as his tenant, from about the 13th day of June, 1863, until about the 1st day of March, 1868; that the use of said premises for that period was reasonably worth fourteen hundred and twelve dollars and fifty cents; that no part of the same has been paid, and the same is now due and owing; wherefore he demands judgment, &c. The defendant answered in several paragraphs, the fourth of which alleged that plaintiff was the son of the defendant, and that said plaintiff, in consideration of natural love and affection, permitted the defendant to occupy said premises, without any agreement or

understanding that said defendant should pay rent for said premises.

There was a demurrer by the plaintiff to this paragraph of the answer, which demurrer was sustained, to which there was an exception.

The third assignment of error is, that the court erred in sustaining the demurrer to the said fourth paragraph of the answer, whereas, by the laws of the land, said demurrer ought to have been sustained to the complaint.

It is conceded by counsel for both parties that the question as to the sufficiency of the complaint is thus presented to us for decision:

The objection to the complaint urged by counsel for the appellant is, that it contains no allegation that the defendant ever *promised* to pay, or ever *agreed* to pay, or that she was *indebted* to the plaintiff. To this the appellee answers that it is not necessary to use any word that shows an undertaking, agreement, or promise, on the part of the defendant, to pay rent, for none ever existed; that the complaint states facts, and, technically speaking, the law raises the implied promise to pay; that the right of action in fact does not stand upon any contract or agreement, but arises from principles of equity and good conscience; that whenever there is ownership of land on the one hand and an occupation of it by permission on the other, it will be presumed that the occupant intends to compensate the owner for the use of the premises.

In support of the complaint we are referred by counsel for the appellee to 2 G. & H. 360, sec. 14, which says: "The occupant without special contract, of any lands, shall be liable for rent, to any person entitled thereto." Authorities are cited having reference to the liability of a party to pay rent under certain circumstances, but this is not a question relating to the right to recover rent on the one hand, or the liability to pay it on the other, but it is a question of pleading. The question is this: Is it allowable, and is it sufficient, for the party to set forth the facts from which a promise or indebtedness may be implied, or must he allege the promise, or

the indebtedness, and then support it at the trial by proof of the circumstances? Mr. Gould, in his valuable treatise on Principles of Pleading in Civil Actions, p. 48, sec. 19, says: In the action of *indebitatus assumpsit*, if there is an actual *debt*, or *legal liability* (by simple contract), on the part of the defendant, but, as is frequently the case, no *express* undertaking to pay the debt, the plaintiff in his declaration must regularly allege a promise. For, as the action of *assumpsit* is in its form and structure adapted to no other demands than those arising upon *promises*, the law, when no promise has actually been made, *implies* or *presumes* one, from the fact of the defendant's being indebted; for the purpose of entitling the plaintiff to this beneficial action, instead of the precarious and less remedial action of debt, which was anciently his only remedy in such a case. But, whenever the promise is thus implied, it is declared upon as an express one, and upon the face of the record is always taken to be express. There is, indeed, no such thing as an implied promise in pleading; or rather, the fact of its being implied appears only in evidence, and never upon the record." It is further said in a note on the same page that in declaring in *assumpsit* on a *bill of exchange* against the drawer, or on a *promissory note* against the maker, the statement of the facts which render the defendant liable to pay is sufficient without expressly alleging a promise on his part; and the reason assigned for this is, that the drawing of the bill, or making of the note, is, of itself, an actual promise. See, also, 1 Chit. Plead. 302.

In the action of *debt*, at common law, the common counts alleged that the defendant was *indebted* to the plaintiff in such a sum, for use and occupation, &c.

The complaint in this case is *sui generis*. We cannot classify it. It is not as in *assumpsit*, for it alleges no promise. It is not as in *debt*, for it alleges no indebtedness. But after some examination of cases decided under codes of practice similar to our own, we have come to the conclusion that, tested by the code, the complaint may be sufficient. It would seem that, contrary to the rule at common law, a party in a

suit for a money demand on contract, like this, when the contract is *implied*, may allege the facts from which the law implies the promise, and it will be sufficient, without alleging a promise itself, or an indebtedness. But if the party omit any fact essential to justify the inference, the pleading will be bad. In all such cases, however, it is better and safer to allege the fact of promise or indebtedness, and then support the allegation at the trial by proof of the particular facts. A pleading, on the one hand, must not state matters of law merely, and on the other hand, it must not state the evidence of the party. It is always good pleading to state the legal effect of the contract, whether it be written or parol.

Of the forms for complaint on contract laid down in the statute, the first six allege a promise. The seventh is somewhat like the complaint in this case, in that it sets out the facts from which the promise is to be implied. In the eighth and ninth the promise is contained in the instrument filed with the complaint. The tenth says the defendant is *indebted* to the plaintiff; and the eleventh alleges that the defendant *owes* the plaintiff.

As the statute declares these forms sufficient in all cases where they are applicable, and that in other cases forms may be used as nearly similar as the nature of the case will admit, a complaint for use and occupation of real estate may be good which alleges the facts from which the implication of the promise or indebtedness will infallibly follow. *Gwaltney v. Cannon*, 31 Ind. 227.

Testing this complaint by this rule, we are inclined to hold it sufficient.

We think also that the fourth paragraph of the answer was sufficient. It was something more than a general denial. It alleged one or more facts which would not have been admissible under a general denial.

There were issues made on the other paragraphs of the answer, a trial by jury, verdict for the plaintiff, motion for a new trial overruled, and judgment.

On the trial, the plaintiff proposed to prove the pecuniary

 Ward v. Bateman.

circumstances of the defendant, to which the defendant objected, but the court allowed the evidence to go to the jury, and the defendant excepted. It appeared from the evidence that the defendant was worth six thousand dollars. The defendant afterwards proved what the plaintiff was worth, which was ten thousand dollars, and the verdict of the jury tended to equalize their estates.

The pecuniary condition of the defendant was not in any way in issue, and the evidence in relation to it was improperly admitted, and may have injuriously affected the defendant in the case in the opinion of the jury.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

A. Iglehart, for appellant.

J. S. Buchanan, H. C. Gooding, and J. M. Shackelford, for appellee.

34	110
142	441

 WARD v. BATEMAN.

SUPREME COURT.—*Bill of Exceptions.*—*Evidence.*—Where a bill of exceptions, although professing to contain all the evidence given in a cause, shows upon its face that this is not true, the Supreme Court will not consider the question of the sufficiency of the evidence.

SAME.—*Bill of Particulars.*—*Striking Out.*—*New Trial.*—The action of the court in striking out parts of a bill of particulars cannot properly be assigned as a cause for a new trial; questions concerning such action of the court should be reserved and presented to the Supreme Court in the same manner as questions in reference to striking out other parts of the pleadings are reserved and presented.

APPEAL from the Wayne Common Pleas.

DOWNEY, J.—Suit by the appellee against the appellant and another on a promissory note. Answer; reply; trial by the court; finding for the plaintiff; motion for a new trial overruled; exception; and judgment.

It is alleged by the appellant that the court erred in refusing to grant a new trial. The new trial was asked, first, because the finding of the court was not sustained by the evidence; second, was contrary to law; third, because the court struck out some of the items of the bill of particulars.

The bill of exceptions, though it professes to contain all the evidence, shows that it does not. The promissory notes given in evidence, by each party, are not set out. Persons are referred to by letters of the alphabet, thus: K. & B., F. R., &c. It professes to be the notes of the evidence as taken down by the judge who tried the case, and not a statement of it at length. It involves, among other things, a statement of a partnership account between the parties.

In *The State v. Swarts*, 9 Ind. 221, this court said: "The bill of exceptions closes with the formal words, 'this was all the evidence,' &c. But, unfortunately, the bill itself elsewhere discloses, that there was other evidence given which it does not contain. It opens by saying that the plaintiff gave in evidence a certain record. But there is no record copied into the bill of exceptions, or otherwise referred to. Hence, as the bill of exceptions does not contain that part of the evidence, it cannot contain all the evidence. It follows that the formal words, as to all the evidence in the cause, are not correct."

If we could, under such a bill of exceptions, consider the question as to the sufficiency of the evidence, we should feel compelled to reverse the judgment. The only statement as to the plaintiff's evidence, in his original case, is this:

"PLAINTIFF'S EVIDENCE.

"1. Note of defendants, Oct. 22d, 1866. \$1,038.00."

We could not determine from this whether the note on which the suit was brought was given in evidence or not; for although the date and amount correspond with those of the note described in the complaint, the time when it matured is not shown. It is not impossible or improbable that other notes of the same date and amount may have been executed at the same time. The same may be said with reference to

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three or more notes relied upon as matters of set-off by the defendant.

The form of the bill of exceptions forbids us to examine the question as to the sufficiency of the evidence.

The error complained of with reference to the striking out of some of the items of the bill of particulars, is not reached by a motion for a new trial. The bill of particulars is a part of the pleadings, and questions concerning the action of the court in striking out parts of it should be reserved and presented to this court in the same manner as questions with reference to striking out other parts of the pleadings are reserved and presented.

The judgment is affirmed, with five per cent. damages and costs.

W. A. Bickle, for appellant.

W. S. Ballinger, for appellee.

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84 112
159 205

EVIDENCE.—Admissions.—Evidence of admissions of a party should be received with great caution. The credibility of the witness, his testimony in proof of the admissions, and the force of the admissions when proved, are matters for the jury.

NEW TRIAL.—Weight of Evidence.—When a verdict is not sustained by *sufficient* evidence, it is the duty of the court trying the cause to grant a new trial upon motion assigning that cause; but the Supreme Court will not reverse the ruling of the court below in refusing to grant a new trial on such ground, unless it appears, not merely that the finding was contrary to the weight of the evidence, but that it was wrong beyond any question whatever.

COSTS.—Administrator.—Where in an action by an administrator to recover damages for the death of his decedent caused by the wrongful act of the defendant, judgment is rendered against the plaintiff for costs, it is error to direct therein that, if there be no property of the decedent, the costs shall be levied of the property of the administrator.

APPEAL from the Scott Circuit Court.

DOWNEY, J.—This action was brought to recover damages

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for the death of Madison Evans, the plaintiff's intestate, alleged to have been caused by the wrongful act of the defendant in shooting him with a pistol and cutting him with a knife.

The case was tried by a jury, on an issue formed by a general traverse of the complaint. There was a verdict for the defendant, a motion for a new trial, which was overruled, and judgment against the plaintiff for costs, to be levied of the property of the deceased, and if no such property remained, then of her own property.

Two only of the alleged errors are presented by the appellant in her brief: first, the refusal of the circuit court to grant a new trial; and second, the rendition of judgment against her for costs in the event that there should be no assets in her hands.

We have examined the evidence with care. There can be no reasonable doubt that the deceased came to his death by violence at the hands of some person. His dead body was found at the roadside. His head was nearly severed from his body. There was a gun or pistol shot in the abdomen, and a stab or two in the back. His hands were badly cut, as if by seizing hold of the knife.

Upon the question of the connection of the defendant with the death of the deceased, there was the testimony of one witness only, testifying to admissions of the defendant, which admissions, if they were made, tended very strongly to show that the defendant was the person who inflicted the injuries. The witness testified that the defendant, among other things, said, that, "under the same circumstances, he would do it again."

On the part of the defendant, several witnesses testified to intimate and friendly relations between the defendant and the deceased down to the day of his death. One testified that he rode into town in company with the defendant, that defendant stopped at his residence, and the witness went to another part of town; that it was dark when they parted;

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that it was not more than forty minutes afterwards until he heard of the death of the deceased; and that he and others went to the place and found the dead body of the deceased lying at the side of the road.

Admissions of a party ought to be received with great caution. The witness may not have correctly understood them. He may not have recollected them. A slight change in the words may alter the meaning. Words material to a correct understanding of the case may have been omitted by the party, or by the witness. In this case, the witness says the defendant said, that "under the same circumstances he would do it again." What were the circumstances? See 1 Greenl. Ev. § 200.

The credibility of the witness, his testimony in proof of the admissions, as well as the force of the admissions when proved, were questions for the jury. See *French v. Green*, 3 Ind. 267.

The rule which governs this court in passing upon the question whether a new trial should have been granted or not, is not the same as that which should govern the court below. When the verdict is not sustained by *sufficient* evidence, it is the duty of the court trying the cause to grant a new trial; but it has been repeatedly decided by this court that it will not reverse the ruling of the court below in refusing a new trial on the ground of the insufficiency of the evidence, unless it shall appear, not merely that the finding was contrary to the weight of the evidence, but that it was wrong beyond any question whatever. *The Indianapolis, &c. R. R. Co. v. Trisler*, 30 Ind. 243, and cases cited in 1 Davis' Ind. Digest 626, sec. 46.

But again, it is required, in order to make out a case like this, that the death should have been caused by the *wrongful* act of the defendant. Such is the language of the statute, and such, in this case, is the allegation of the complaint. Was it necessary to show, conceding that the admissions of the defendant were sufficient to connect him with the killing, that such killing was wrongful? Let it be supposed that

the language attributed to the defendant was used by him, what were the "circumstances" to which he alluded? Do they point to some justification, such as self-defense or some other justifiable killing? Conceding that the killing is shown, in a case like this, does the presumption of wrongfulness or malice arise as in criminal prosecutions for homicide? Must the defendant, in case he relies on self defense, or other justification, plead and prove it affirmatively, or must the plaintiff, in the first instance, prove the circumstances attending the transaction and show its wrongfulness?

We cannot sustain this assignment of error.

Upon the other question we think the court erred. That part of the judgment for costs which directs that they be levied of the property of the appellant, in the event that there shall be no property of the estate out of which to make them, is contrary to law. 2 G. & H. 527.

The judgment is affirmed, except so much thereof as directs the costs to be made of the property of the plaintiff in the event that there shall be no property of the deceased out of which to make the same, which part is reversed, with costs.

A. C. Voris, M. F. Dunn, and F. Wilson, for appellant.

A. B. Carlton, for appellee.

ENGLISH and Others v. SMOCK and Others.

JURISDICTION.—*Courts of Inferior and Limited Jurisdiction.—Discretion.—*

When statutory powers are conferred upon a court of inferior and limited jurisdiction, as the board of county commissioners, and a mode of exercising those powers is prescribed, the mode prescribed must be strictly pursued, or the acts of such court will be *coram non judice* and void; but where such a court has been entrusted with discretionary powers, no other court can interfere with such discretion or control the exercise thereof, as to acts performed in good faith within the power conferred.

34	115
142	19

24	115
158	246

34	115
162	54
162	601

34	115
1169	375

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INTEREST.—“*Annual Interest.*”—*Construction.*—When an instrument provides for the payment of “annual interest,” and is silent as to when the interest shall be paid, it is payable at the end of each year.

SAME.—*In Advance.*—It is not usurious or illegal to take interest in advance at the highest rate of interest allowed by law.

COUNTY BONDS.—*Powers of County Commissioners.*—*Injunction.*—The board of county commissioners may issue bonds of the county to raise money to build, complete, or repair county buildings, and for that purpose have power to decide upon the necessity of such construction, completion, or repairs, and that the revenues afforded by reasonable taxation are insufficient therefor, and to fix the time within which the bonds shall be paid, and, in the absence of fraud, the exercise of such power cannot be questioned in a suit to enjoin the issuing of such bonds; but it is required by the statute that the interest on such bonds shall be made payable annually; and if it be ordered by the board that the interest be made payable at shorter periods, the issuing of the bonds may be enjoined at the suit of a citizen and taxpayer of the county.

APPEAL from Marion Common Pleas.

BUSKIRK, J.—The sole purpose of this proceeding was to enjoin the board of commissioners of Marion county from issuing the bonds of the county for the sum of four hundred thousand dollars, and putting them on the market, to raise money to build a new court house, and to complete the building of an asylum for the poor, already in progress of erection.

The complaint alleges, that the board of commissioners of Marion county, on the 8th day of July, 1870, made and caused to be entered of record the following preamble and order.

“Whereas the court house of the county of Marion having become untenable through decay, has been removed; and

“Whereas the county of Marion is now about to begin the construction of a new court house upon the square occupied and used for such purpose; and

“Whereas the county is now engaged in the construction of an asylum for the poor upon land belonging to the county, and the same is not yet completed; and

“Whereas funds are needed to construct said court house, and to complete said asylum for the poor; and

“Whereas the revenues of the county afforded by reasonable taxation are insufficient to accomplish these objects; and

“Whereas it is believed that a loan of the funds can be effected upon satisfactory terms, by the sale and negotiation of the bonds of the county, of the character hereinafter provided for; it is therefore

“*Ordered*, by the board of commissioners of Marion county, Indiana, that bonds of the county be issued for a loan to raise the funds for the building purposes before mentioned, in the sum of four hundred thousand dollars, being an amount not exceeding one per centum of the assessed valuation of the real and personal property in the county—fifty thousand dollars of the same being for the completion of the asylum for the poor, and three hundred and fifty thousand dollars for the construction of a court house for county purposes.

“The said bonds shall be issued in denominations of not less than five hundred dollars each, and shall bear interest payable semi-annually, on the first days of August and February in each year, at the rate of ten per cent. per annum.

“The principal and interest of said bonds shall be payable without relief from valuation or appraisement laws, at —, in the city of Indianapolis.

“The principal shall be payable on the first day of August, 1885, but the same may be redeemed at the pleasure of Marion county, at any time after the first day of August, 1877.”

The complaint further alleges, that the said board of commissioners are, in pursuance of the said order, about to issue the said bonds and place them on the market for sale; that the said board of commissioners will so issue and sell such bonds, unless they are enjoined from so doing; and that the plaintiffs are citizens and taxpayers of the said county, and as such have a personal and pecuniary interest in the making of the said loan. The prayer of the complaint was for a perpetual injunction and general relief.

The appellants demurred to the complaint, for the follow-

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ing reasons: first, the court has no jurisdiction of the subject of the action; second, the plaintiffs have no legal capacity to sue; third, there is a defect of parties plaintiffs; fourth, want of sufficient facts. The demurrer was overruled, and exception was taken.

The judge, sitting in chambers, granted an injunction, from which order the appellants appealed to this court. The errors assigned are two: first, the court erred in overruling the demurrer; second, the court erred in granting an injunction.

The appellees alleged in their complaint, and have urged in argument in this court, four reasons why the action of the board of commissioners was illegal, and ought to be enjoined.

The first is, that the interest on the bonds proposed to be issued is made payable semi-annually, when, by the law, the interest must be made payable annually.

The second is, that the statute prescribes the maximum rate of interest to be paid on county bonds at ten per cent. per annum, and when the interest is paid every six months, it, in effect, exceeds the rate of interest fixed by law, and makes it usurious.

The third is, that by the order of the board of commissioners, the bonds are to be payable on the first day of August, 1885, but the same may be redeemed at the pleasure of Marion county, at any time after the first day of August, 1877, when the law requires that they shall be payable in ten years.

The fourth is, that the commissioners are only authorized to borrow money, for the purposes named in the order, when the revenues afforded by reasonable taxation are insufficient to raise the money required; and it is averred that the revenues that would be afforded by reasonable taxation would be amply sufficient to raise all the funds required.

The appellants' demurrer admits the truth of the matters alleged in the complaint, but denies that the appellees are, under the law, entitled to the relief prayed for. The parties

have submitted very elaborate and able arguments. The appellants insist that the court possessed no jurisdiction of the subject-matter, and had no power or authority to enjoin them in the premises. It is maintained with great earnestness, that "the members of the board are the ultimate and exclusive judges, while the matter is pending before them, of the necessity and propriety of the loan, its amount, the manner and time of making it, and to provide the means of payment ; and that, in the absence of allegations of fraud and corruption, a court of chancery possesses no power to review or enjoin their proceedings." We cannot give our assent to this broad and unqualified proposition. The board of commissioners is a court of inferior and limited jurisdiction, and it is well settled, both on principle and by authority, that where statutory powers are conferred on such a tribunal, and a mode of executing those powers is prescribed, the course pointed out must be strictly pursued, or the acts of such court will be *coram non judice* and void. When such a court has been entrusted with the exercise of discretionary powers, and the acts done are within the power conferred, and have been performed in good faith, then no court possesses the power to interfere with or control such discretion.

Adams, in his work on equity, states the rule thus: "The same principles are equally applicable to all other persons who have been authorized by the legislature to do specified acts, which, without such authority, they would be incompetent to do. So long as they are acting within their prescribed limits, the court of chancery has no control ; but if they exceed those limits, if they are assuming to do that which the legislature has not said they may do, then, in so far as the excess is concerned, they have no authority ; and, if their acts be of a nature to warrant an injunction, it will be granted against them." Adams Equity, 212.

In the case of *Hartwell v. Armstrong*, 19 Barb. 166, which was a proceeding to enjoin commissioners appointed by the legislature to drain swamp lands, the court say: "Even if they err in judgment, a court would hardly be justified in

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interfering by the summary process of injunction to restrain their proceedings. Unless the defendants are violating the plain and manifest *intent* and *object* of the statute under which they are acting, or are proceeding in bad faith, the court should not interpose its authority to suspend the work."

SPENCER, J., in *Lawton v. Comm'rs of Cambridge*, 2 Caines, 179, observes, "The necessity of a superintending power, to restrain and correct partialities and irregularities which may be committed by inferior officers, is so obvious and indispensable, that the court ought by no means to deny themselves a jurisdiction of such salutary influence."

In the case of *Burnet v. The Corporation of Cincinnati*, 3 Ohio, 73, the Supreme Court say, "The bill, in this case, represents, that under a proceeding altogether illegal and void, but nevertheless under legal color, the defendants are about to sell a part of the real estate of the complainant, and prays the interference of the court, in the exercise of its chancery powers, to restrain them by injunction. The demurrer, and the argument in support of it, admit the truth of the allegations, and deny that this court can aid the party. If this be a tenable position, it results that public officers, having authority to operate upon the property of their fellow citizens, must be permitted to proceed, however illegal, unjust or oppressive their conduct may be. It follows, too, that the property of the citizen may be exposed to sale under circumstances that render it impossible for the parties to know whether a title can pass or not, thus involving great hazard to all concerned, and perplexing the titles to real estate, for no beneficial purpose to any person whatever. If such be the rule of the law, we must so administer it. But nothing short of a series of repeated adjudications would be sufficient to demonstrate that the law is so settled." The court, after a careful examination of the adjudicated cases, sustained the injunction.

The attorneys for the appellants have pressed upon our consideration the case of *Haight v. Day*, 1 Johns. Ch. 18, where the Chancellor says, that "where the statute gives to

commissioners a discretion in a *particular case*, and for a *special purpose*, I doubt, exceedingly, whether a mistake of judgment in that case can be corrected," &c. This case is not in conflict with the current of authorities, when the point on which the case is decided is properly understood. The Chancellor, in a subsequent part of the opinion says, "Here, the legislature selected the trustees, by name, for a special purpose, and no other, and confided to them to act, in the given case, as they should *judge discreet and proper*; and after the act was performed, they were to become *functi officio*. These words, as they should judge discreet and proper, gave an undefined discretion, and would be utterly senseless, upon the construction that the apportionment was intended to be, to each subscriber, in a *ratio* to the amount of the subscription. That would have been a plain mathematical rule, without the exercise of any discretion; and if that had been the meaning of the law, it would, undoubtedly, have said so."

The above case was decided on the principle that the duties of the commissioners were not defined or prescribed by the law, and that the legislature had conferred upon them an undefined and *uncontrollable discretion*.

The same learned and eminent chancellor in the subsequent case of *Belknap v. Belknap*, 2 Johns. Ch. 463, held, that "where commissioners appointed under the authority of the act of the legislature, to drain a swamp, *exceed their authority*, to the injury of the plaintiff, a perpetual injunction will be granted, although there has been no trial, the plaintiff's title to the land being undisputed."

The cases of *Mooers v. Smedley*, 6 Johns. Ch. 28, and of *Magee v. Cutler*, 43 Barb. 239, are referred to and relied upon with great confidence by the attorneys for the appellants as sustaining and supporting their position. We have carefully examined these cases, and find that the injunctions were refused upon the sole ground, that by the statutes of New York, the court of chancery had no jurisdiction, for the reason that the Supreme Court had the sole and exclusive jurisdiction, and that the remedy was by *certiorari*, and not

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by injunction. The same doctrine has been repeatedly asserted since, in *Wiggin v. The Mayor of New York*, 9 Paige, 16; *Van Doren v. The Mayor, &c.*, *id.* 388; *Heywood v. The City of Buffalo*, 4 Kernan, 534; and in *Susquehanna Bank v. The Supervisors of Broome Co.*, 25 N. Y. 312.

Hilliard on Injunction, p. 521, says: "In New York, the writ of injunction, as a provisional remedy, is abolished by the code of procedure, and an injunction by order substituted." In New York the old remedy was mainly by *certiorari* in the Supreme Court, and now the writ of injunction is abolished, and the proceeding is by order. This peculiarity in the laws and practice in New York will explain the apparent conflict between the decisions in that and other states, as to the jurisdiction and power of courts of chancery.

But we are not without authorities in this State, on the question under discussion. It has been repeatedly held, that "if illegal taxes are assessed and threatened to be collected, the appropriate remedy to restrain their collection is by injunction." *Greencastle Township v. Black*, 5 Ind. 557; *The City of Lafayette v. Jenners*, 10 Ind. 70; *The Toledo & Wabash R. R. Co. v. The City of Lafayette*, 22 Ind. 262; *Coffman v. Keightley*, 24 Ind. 509; *The Board of Comm'rs of Miami Co. v. Bearss*, 25 Ind. 110; *The Board of Comm'rs of Harrison Co. v. McCarty*, 27 Ind. 475.

The case of *Green, Treasurer, &c., v. Beeson*, 31 Ind. 7, was a proceeding to enjoin the collection of taxes assessed against the plaintiffs for the construction of a turnpike under the act of March 6th, 1865. The act of 1865 provided that no road constructed under that act should be less than five miles in length. The board of commissioners had consolidated two roads; one of the roads consolidated was one mile long, and was already completed, and the other was uncompleted and was four miles in length. The taxes were assessed to build the uncompleted road. FRAZER, J., speaking for the court, says: "But it is urged, that the board of commissioners having permitted the organization of the turnpike company, the matter is no longer open to inquiry. This position is unten-

able. The commissioners were in the exercise of a special statutory power; they cannot exercise it in disregard of the statute which confers it, and especially where that statute expressly forbids them to do so; and any attempt of the kind is merely a nullity, binding nobody. A judicial proceeding where parties have a right and opportunity to be heard is very different; and in such a case a judgment which the tribunal has jurisdiction to render will bind, though it be erroneous. But in the case before us, as stated in the complaint, the commissioners had no jurisdiction to authorize the corporation. The proceeding before them was *ex parte*; nobody was required to be notified. It would be monstrous if action had under such circumstances should be held to conclude further inquiry."

BALDWIN, J., in the case of *Bonaparte v. The Camden and Amboy R. R. Co.*, Bald. 205, says: "We know of no rule which excludes from this process any person over whom the court has jurisdiction, on account of the character or capacity in which he acts, although it is conferred upon him by a law of a state or of Congress. If the law is unconstitutional, it can give no authority, if the power it confers is abused or exceeded, the person who acts by color of law merely, is a trespasser. * * * It must then be taken as settled, that the circumstance of a defendant acting under color of law, or as the agent of a corporation for making a road, canal or other improvement, is not of itself a good objection to the granting an injunction. The court cannot control them in mere matters of discretion; they must keep *strictly within their powers*, must not deviate from the line or route prescribed, abuse, misapply, or *exceed their authority*; when they do so, a court of equity will leave a complaining party to resort to the special tribunal designated by the law, to decide on all questions arising in its execution; but if they act otherwise, the court will proceed in the usual way, by injunction."

But it is insisted in argument by appellees that the injunction should have been granted because the appellees had no adequate remedy at law. This involves an inquiry into what

is an ample remedy at law. There is a recent decision of the Supreme Court of the United States which is decisive of this question. In the case of *Watson v. Sutherland*, 5 Wall. 74, which was a proceeding to enjoin a marshal from selling a stock of goods that had been levied on as the property of Wroth & Fullerton and which goods were claimed by Sutherland, the Supreme Court say, "It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity cannot give relief, 'but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.' 3 Pet. 210. How could Sutherland be compensated at law, for the injuries he would suffer, should the grievances of which he complains be consummated? * * * It is well settled that the measure of damages (in an action against the marshal), if the property were not sold, could not extend beyond the injury done it, or, if sold, to the value of it, when taken, with interest from the time of taking down to the trial. And this is an equal rule, whether the suit is against the marshal, or the attaching creditors, if the proceedings are fairly conducted; and there has been no abuse of authority. Any harsher rule would interfere to prevent the assertion of rights honestly entertained, and which should be judiciously investigated and settled. Legal compensation refers solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner, by the trespass. Loss of trade, destruction of credit, and failure of business prospects, are collateral and consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law. Commercial ruin to Sutherland might, therefore, be the effect of closing his store, and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings *in limine*, brings the

parties before it, hears their allegations and proofs, and decrees, either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the pleadings."

It is quite clear, that the appellees, according to the principles enunciated in the above case, had no adequate and complete remedy at law. But it is also contended, that the court should not have enjoined the issue and sale of the bonds for the reason that the appellees might have appealed from the orders of the board made in reference to the loan and assessment for the payment thereof.

Let us examine this question briefly. This court in the case of *Green, Treasurer, v. Beeson, supra*, say, "If the corporation cannot lawfully expend money under its peculiar organization, what equity can there be in allowing it to collect money?" We will transpose this sentence, so as to make it applicable to the case under consideration. If the board of commissioners cannot lawfully issue and sell the bonds under the order made, what equity can there be in allowing them to do so, and then levy the taxes to pay the interest and principal of bonds that were illegally issued? There would be just as much reason and plausibility in the position that the appellees should permit the bonds to be issued and sold, the taxes to be levied, and their lands to be sold for the non-payment of such taxes, because they might defend an action brought by the purchaser to recover the possession of the lands.

MARSHALL, C. J., in *Osborn v. U. S. Bank*, 9 Wheat. 738, says, "But it is the province of a court of equity, in such cases, to arrest the injury and prevent the wrong. The remedy is more beneficial and complete than the law can give."

The Supreme Court of Ohio, in *Burnet v. The Corporation of Cincinnati, supra*, say, "When an assessment of a tax is made, and its legality disputed, the uncertainty attendant

upon the final result puts the estate upon which it operates in imminent jeopardy. He can defend his possession; but if title do pass, he is remediless altogether. A mode, therefore, of deciding the question before any right is affected, is safest for all parties. It was upon this ground that the court entertained jurisdiction in the case of the *Bank United States v. Shultz*, from which, in principle, this case is not distinguishable."

The case of *Tash v. Adams, Treasurer*, 10 Cush. 252, was a proceeding to enjoin the collection of certain taxes that had been voted by Natick, and the injunction was refused upon the ground that the petitioners had been guilty of "laches and unreasonable delay in the enforcement of their rights." The court say: "Upon these facts, we think it very clear that the petitioners are not in equity entitled to the relief which they seek. So far as relates to this vote and appropriation by the town, assuming that the purpose for which the money was appropriated was illegal, because it was one for which towns are not authorized to incur expenditures or raise money (upon which question we express no opinion), nevertheless, the petitioners fail to make out a case entitling them to the interposition of this court. It is a well settled rule in equity, that if a party is guilty of laches, or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief. This rule is more especially applicable to cases, where a party, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by, and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character. 2 Story Eq. § 959, *a*; *Drewry Injunc.* 294. The facts bearing on this part of the case as presented by the petitioners bring it very clearly within the operation of this salutary rule. The petitioners not only failed to use due and reasonable diligence in asserting their rights and seeking a remedy, but were guilty of gross laches. With a full knowledge of the vote of the town, and the proceedings of the committee, they permitted

contracts to be made and expenditures to be incurred, not only by the committee, but by third parties, who acted in good faith, relying on the credit of the town. They took no measures to enforce their rights until after the celebration had taken place, and innocent parties had come under liabilities which they would not have assumed if the petitioners had seasonably sought redress for the impending grievance. To issue our injunction restraining the payment by the town of the bills thus incurred, would be manifestly most inequitable."

These authorities demonstrate that the objection urged is invalid. It is quite clear that the court committed no error in overruling the demurrer to the complaint.

The next error assigned is, for granting the injunction.

The decision of this question renders it necessary that we should examine the objections that are urged to the order of the board of commissioners. The first is, that the interest on the bonds is payable semi-annually, when the law requires that it shall be paid annually.

The proceedings of the board of commissioners were had under sections 17, 18, 19, 20, 21, and 22, of an act entitled "an act providing for the organization of county boards, and prescribing some of their powers and duties" (approved June 17th, 1852).

Section 17 of the above act, as it was originally passed, provided that not more than ten thousand dollars should be borrowed, and fixed the rate of interest not exceeding the legal rate in the state or territory where the bonds were sold. This section was amended in 1869, by fixing the amount to be borrowed at not exceeding one per cent. of the assessed valuation of the real and personal property of the county, and declaring that the interest should not exceed ten per centum per annum.

Section 17, as amended, confers upon the board of commissioners the power, whenever it shall be necessary to construct, complete, or repair the court house, jail, or other county buildings, or whenever it shall be desirable to fund

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or average any existing debt incurred for county purposes, and the revenues afforded by reasonable taxation are insufficient to do the same, to borrow for that purpose, any sum of money, not exceeding one per centum on the assessed valuation of the real and personal property of the county, and to issue bonds therefor, in amounts not less than twenty-five dollars each, and bearing a rate of interest not exceeding ten per centum per annum.

Section 18 reads as follows: "Such bonds may be sold at any place within the United States, but at no greater rate of discount than eight per cent., and shall be in form substantially as follows: State of Indiana, county of ———: The county of ——— will pay to the bearer ——— years from the date hereof, the sum of ——— dollars and ——— cents with interest thereon at the rate of ——— per cent., payable annually at ———, in the State of ———, on the ——— day of ———, in each year.

—————, Commissioners of County."

Then follows the certificate of the county auditor, but no question arises thereon, and it is omitted. Section 19 provides the manner in which the auditor shall deliver the bonds to the treasurer, and fixes the liability of the treasurer on his official bond for such county bonds.

Section 20 makes the bonds assignable by indorsement thereon, and vests the title thereto absolutely in each and every indorsee successively. Section 21 provides that, whenever such bonds are sold or negotiated, the commissioners shall make a levy of not less than one-tenth of one per cent. on the taxable property of such county, and cause the same to be placed upon the tax duplicate, properly designated in a separate column, for the current and succeeding year; and such tax, when collected, shall be invested in the bonds aforesaid, or other state and county securities, and thereupon shall constitute a sinking fund for the extinction and ultimate liquidation of the debt created by the issue of such bonds.

Section 22 reads as follows: "The board of commissioners

shall provide by taxation for the annual payment of the interest accruing on all bonds sold, and for that purpose shall make a distinct and specific levy, and cause the same to be placed in a separate column, upon the tax duplicate, and such levy, when collected, shall be applied to the payment of the interest as aforesaid, and the balance, if any, to the payment of the principal of such debt, and for no other purpose whatever."

The order of the commissioners provides that the interest upon the bonds shall be payable semi-annually, and it is claimed by the appellees that, under the law, they possessed no power to make such an order. If the commissioners have exceeded the authority vested in them by the legislature, all acts done, or orders made, in excess of the prescribed limits, are illegal, and should be enjoined. We have given this question great consideration, and are quite clear that the board of commissioners possessed no power to provide for the payment of the interest semi-annually. The eighteenth section prescribes the form of the bond that shall be issued, and it provides, in express terms, that the interest shall be "payable annually." Section 22 declares, that "the board of commissioners shall provide by taxation for the annual payment of the interest accruing on all bonds sold." In the form of the bond it is declared that the interest shall be "payable annually," while in the twenty-second section the commissioners are required to provide for the "annual payment of interest."

Do the phrases "payable annually" and "annual payment" mean the same or a different thing? This question has been answered by the Supreme Court of Vermont, in the case of *Catlin v. Lyman*, 16 Ver. 44, where it is said, "The only question arising upon the merits of the present case is, whether a promissory note, payable in ten years from date, with *interest annually*, imposes the same legal obligation as when payable with *annual interest*. The attempt to make any distinction in the two cases savors too much of refinement.

It is no doubt true, that, in strict grammatical construction, the forms of expression are quite susceptible of different imports. But courts of justice, in putting a construction upon contracts, should be governed more by the popular than by the strict philological import of words and phrases. It is in this way only that we are enabled to get any well founded basis of making contracts speak the intention of the parties to them."

When the bond, note, or instrument provides for the payment of annual interest, and is silent as to when the same shall be paid, when is it payable? This question is answered by the Supreme Court of New Hampshire, in the case of *Pierce v. Rowe*, 1 N. H. 179. The court say: "But we have already perceived that, by an express agreement of the parties, 'interest' on the sum named in the note in this action became due '*annually*,' or at the end of each year. In this respect it resembled an instalment of principal thus becoming due; and the decisions are numerous, that after the end of each year, an action could be sustained for the annual interest, as well as for the instalments."

According to these decisions—and many more could be produced to the same effect—the commissioners should have provided for the annual payment of interest, the legal effect of which would have been that the interest would be due and payable at the end of the year.

The order of the board is in conflict with the letter of the law, and we think it quite clear that it equally violates the spirit of the law. It is susceptible of the plainest demonstration, that it was the true intent and meaning of the legislature that the interest should be payable annually, and at the end of the year. Before the commissioners were authorized to make a loan, they were required to find and enter of record "that it was necessary to construct, complete or repair the court house, jail or other county buildings," and that "the revenues afforded by reasonable taxation are insufficient to do the same." When these facts are found, the board could make a loan, and not before or otherwise. The amount borrowed cannot exceed one per centum on the assessed valua-

tion of the real and personal property of the county. Section 21 requires the commissioners to make an annual levy of not less than one-tenth of one per cent. on the taxable property of the county, and cause the same to be properly designated and placed in a separate column; and this, when collected, is to be applied to the payment of the principal of the loan. Section 22 requires the commissioners to make a distinct and specific levy, and cause the same to be placed in a separate column on the tax duplicate, of a sum sufficient to provide for the annual payment of the interest; and the balance, if any, is to be applied to the payment of the principal of such debt, and for no other purpose whatever. The annual payment of the interest is provided for by annual taxation. The intention was that the interest should be payable at the end of the year, and that the money required to pay it should be collected by taxation; and this view is greatly strengthened by the fact that the commissioners are required, "whenever the bonds are sold or negotiated," to make a levy. The taxes are payable once a year.

If the interest is payable at the end of six months after the bonds are sold, no money will be raised, by taxation, to pay it. The ground upon which the commissioners are authorized to make a loan is, that the county cannot spare any money from the general fund. The money collected by taxation under sections 21 and 22 is to be applied, solely and exclusively, to the payment of the annual interest and the principal. The county will, then, at the end of six months, if the interest is payable semi-annually, be compelled to pay the interest out of the general fund, or borrow the money. In the former case, the county loses the use of the money for six months or until the annual tax is collected, while interest may be accumulating on her orders; and in the latter case the county is compelled to pay interest on money with which to pay interest on her bonded debt. The loan authorized by the order under consideration is four hundred thousand dollars. The interest is forty thousand dollars per annum. Suppose one person takes the entire loan. If the interest is pay-

able semi-annually, he will receive, at the end of six months, twenty thousand dollars. The interest upon that sum for six months, at the rate of ten per cent., is one thousand dollars, thus making the interest forty-one thousand dollars instead of forty thousand dollars. The bonds may be sold at a discount of eight per cent. The interest is ten per cent. It seems to us, that the great and rapidly increasing wealth of Marion county, the certainty of the annual payment of ten per cent. interest, and the ultimate redemption of the bonds, ought to be enough to induce capitalists to invest their money in these bonds without the payment of a bonus of one thousand dollars a year. It is very clear to us, that the payment of the interest semi-annually is in violation, not only of the letter, but also of the true intent and meaning of the law, and is unauthorized and illegal, not because it is usurious, but because the commissioners were not authorized by law to make such a contract. *The E. I. & C. Straight Line R. R. Co. v. The City of Evansville*, 15 Ind. 395; *Bank of Chillicothe v. Swayne*, 8 Ohio, 252; *Bank of the U. S. v. Owens*, 2 Pet. 527; *Straus v. The Eagle Ins. Co.*, 5 Ohio St. 59.

The second objection is, that the payment of interest in advance, or semi-annually, would make it usurious. We do not think so. It is now well settled that interest may be demanded in advance, at the highest rate of interest allowed by law, and this will not make it usurious or illegal. *Fleckner v. Bank U. S.*, 8 Wheat. 354; *Haas v. Flint*, 8 Blackf. 67; *Cole v. Lockhart*, 2 Ind. 631; *Mowry v. Bishop*, 5 Paige, 98. Besides, the interest law of 1867 provides, that interest "may be taken yearly, or for a shorter period, in advance." 3 Ind. Stat. (Davis), 317. But this would not apply in a case like the one under consideration, where the law requires the interest to be paid at the end of the year. The conclusion that we have reached as to the payment of interest semi-annually, deprives the second objection of any force; for as the interest has to be paid annually, the objection is removed. Our only purpose in considering it is to show that it would not make it usurious.

The third objection is, that the law requires the bonds to be payable in ten years, and that the order provides that they shall be payable at the end of fifteen years, subject to be redeemed at the pleasure of the county after seven years. We have given this objection mature consideration. There is great plausibility in the argument made. The loan cannot exceed one per centum of the assessed valuation of the real and personal property of the county. The interest on the loan is to be paid by a *distinct and specific levy* as provided in section 22. Section 21 requires a levy of one-tenth of one per cent. of the taxable property. If the taxes levied were all collected, the bonds could be paid in ten years. But there is no plain and express requirement of the statute that the bonds shall be payable in ten years, and the implication arising from the language of the statute is not plain and strong enough to justify us in so holding. Besides, the provision for the creation of a sinking fund tends strongly to show that it was the intention of the legislature to leave to the sound discretion of the commissioners, the time within which the bonds should be paid, and, in the absence of fraud or bad faith, we have no power to enjoin acts that are within the power conferred, and have been performed in the exercise of a sound discretion.

The fourth specification of causes why the court should enjoin the board of commissioners is, that reasonable taxation will supply sufficient funds to complete the asylum for the poor and construct the court house, without resorting to a loan; that the taxable property of the county amounts to forty millions, and that thirty cents upon the one hundred dollars will yield sufficient funds for the contemplated public buildings.

The learned attorneys for the appellants make the following answer to this objection: "There is no allegation that the board of commissioners are acting fraudulently or corruptly; indeed, it is admitted, in argument, that they are acting honestly, but it is claimed that they are mistaken in their policy. Now, this is a singular appeal to make to

the court. The law confides this matter exclusively to the board of commissioners, and they have the means of ascertaining all the facts necessary to form their judgment and shape their policy. They know the wants of the county and the amount of necessary expenditures; they are supposed to know whether reasonable taxation will afford sufficient funds to construct and complete these public buildings. They know the legacy of expense the war has entailed upon us for the support of widows and orphans and poor families, and how long these extra expenses are likely to continue."

In support of the above argument we refer to the following authorities. The Court of Appeals in the State of New York, in the case of *Porter v. Purdy*, 29 N. Y. 106, say, "When in special proceedings in courts, or before officers of limited jurisdiction, they are required to ascertain a particular fact, or to appoint persons to act in such proceedings, having particular qualifications, or occupying some particular relation to the parties or the subject matter, such acts, when done, are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose; and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be."

This court, in the case of *The Evansville, &c., R. R. Co. v. The City of Evansville*, 15 Ind. 395, say, "It is a well settled principle, that when the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle, by its decision, such decision is conclusive." *Brittain v. Kinnaird*, 1 Brod. & B. 422; *Betts v. Bagley*, 12 Pick. 572; *Martin v. Mott*, 12 Wheat. 19; *Vanderheyden v. Young*, 11 Johns. 150; *Birdsall v. Phillips*, 17 Wend. 464; *Ex Parte Watkins*, 3 Pet. 193; *The People v. The City of Rochester*, 21 Barb. 656. The case of *Dequindre v. Williams*, 31 Ind. 444, and the decisions there referred to and discussed are much in point.

The power and authority of the board of commissioners to act in the premises depended upon whether the money was required for the purposes named in section seventeen, and

whether the money could be raised by reasonable taxation; and these facts having been found and settled, the decision is conclusive upon us in this proceeding.

We therefore hold that the order of the board of commissioners was in all things valid, except in providing for the payment of the interest semi-annually; and for that reason the judgment of the court below in granting the injunction must be affirmed. The foregoing opinion presents the views of a majority of this court, PETTIT, C. J., dissents from our reasoning and conclusions, and will file a separate opinion stating the grounds of his dissent.

The judgment is affirmed, with costs.

PETTIT, C. J.—This was a complaint against the Board of Commissioners of Marion county to enjoin them from issuing four hundred thousand dollars in bonds of the county and putting them on the market, to raise money to build a new court house and to finish an asylum for the poor already commenced. The statute fully authorizes the board to make this loan. 3 Ind.Stat. 131. The grounds upon which the injunction is asked are technical and for supposed slight variations from the strict letter of the directions of the law in the proceedings of the board.

Where discretionary powers are given to a board, corporation, or person, for public purposes, an injunction will not be granted to forbid their exercise unless a gross departure from the law granting the power is shown, or fraud or corruption is charged. *Auburn, &c., v. Douglass*. 12 Barb. 553; *Burnham v. Kempton*, 44 N. H. 78; *Roath v. Driscoll*, 20 Conn. 533; *Kekewich v. Marker*, 5 Eng. L. & Eq. 129; *The City of Lafayette v. Bush*, 19 Ind. 326.

In *Mooers v. Smedley*, 6 Johns. Ch. 28, the Chancellor said: "I cannot find by any statute, or precedent, or practice, that it belongs to the jurisdiction of chancery, as a court of equity, to review or control the determination of the supervisors in their examination and allowance of accounts as chargeable against their county, or any of its towns, and in

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causing the money so allowed to be raised and levied. There was no allegation of fraud or corruption in the case. The most that could be said was that they made an erroneous determination."

If the legislature has entrusted the exercise of the power to the sole judgment and discretion of a particular person, or body of individuals, no court is authorized to interfere with or control that discretion, provided it is exercised in good faith. See cases cited in 3 Abbott's N. Y. Dig. 362.

"An injunction cannot be granted to restrain the acts of officers of state, unless they are violating the plain and manifest intent of the statute under which they are acting, or are proceeding in bad faith." *Hartwell v. Armstrong*, 19 Barb. 166.

In *Haight v. Day*, 1 Johns. Ch. 18, the Chancellor uses the following language: "When a statute gives to a commissioner a discretion in a particular case, and for a special purpose, I doubt exceedingly whether a mistake of judgment, in that case, can be corrected. The Supreme Court seemed to think it could not, in the case of *Lawton v. The Commissioners of Highways*, 2 Caines R. 182."

"The court will not issue an injunction to restrain public officers from issuing bonds as they are authorized by law, upon a mere apprehension that the public officer who is designated to receive them will misapply their avails." *Faulkner v. Metcalf*, 43 Barb. 255.

I think the court erred in overruling the demurrer.

L. Barbour and *C. P. Jacobs*, for appellants.

H. C. Newcomb, *J. L. Mitchell*, and *W. A. Ketcham*, for appellees.

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PRICHARD and Another v. THE STATE, on the Relation of
KELLER and Others.

CO-ADMINISTRATORS.—*Joint Bond*.—Where co-administrators execute a joint bond as such, each is liable thereunder for the acts and omissions of the other.

SAME.—*Suit on Bond*.—*Sureties*.—*Execution*.—Where, in an action on such joint bond, judgment is rendered for the plaintiff, the sureties on the bond have a right to an order directing that the execution to be issued on the judgment be first levied on the property of the principals, although one of the principals may have taken possession of the entire assets of the estate and administered the estate, so far as it has been administered, and the other administrator has never received any of said assets.

APPEAL from the Bartholomew Common Pleas.

DOWNEY, J.—This action was predicated on a bond executed by Elizabeth Cox, Ezekiel Nicholds, Henry R. Prichard and Isham Keith. It is alleged in the complaint that Elizabeth Cox and Ezekiel Nicholds were appointed administrators of the estate of Aaron Cox, deceased, and that the bond was executed by them to secure the faithful performance of their duties, with Prichard and Keith as their sureties.

It is also alleged, among other things, that Nicholds attended to the business of the administration, received all the assets, and that there remained in the hands of the administrators the sum of five thousand dollars of the money of the estate. It is also alleged, that they had been required to pay the money into court, and because they had not done so, and because Nicholds had become a non-resident of the State, they had been removed from the trust by the order of the common pleas.

Mrs. Cox demurred to the complaint, on the ground, as we are informed, that as Nicholds had received all the money, she was not liable.

This demurrer was overruled by the court, and, we think, correctly. Had the administrators executed separate bonds, as contemplated by the statute, 2 G. & H. 489, sec. 19, she might not have been liable for the acts and omissions of Nicholds. But as she executed a bond jointly with him,

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the rule is different. *Braxton, Adm'r, v. The State, ex rel. Albert*, 25 Ind. 82.

Mrs. Cox answered, first, by a general denial; and, second, that she had fully administered all the property that had come to her hands.

There was a demurrer filed and sustained to the second paragraph of her answer; and we think this was right, for the reasons above given.

Prichard and Keith answered separately, first, a general denial; second, that the administrators had fully administered; and third, by way of cross complaint, that they were the sureties of Cox and Nicholds, and asked an order that the execution to be issued on the judgment might be first levied on the property of the principals.

At this point in the case, a suggestion was made that Nicholds had not been found, and as to him the case was continued.

Elizabeth Cox answered the cross complaint, first, that Prichard and Keith were sureties for Nicholds; that she was one of the principals in the bond, and not in any respect whatever surety of Nicholds; and that no assets came to her hands, but that Nicholds took entire possession of all the estate, and administered the same, so far as it was administered; and that, therefore, she ought not to be charged with the default of Nicholds, but the same should be charged against him, and Prichard, and Keith; second, the general denial.

A demurrer by Prichard and Keith was sustained to the first paragraph of this answer. This was right. There was nothing in it which should bar the right of the sureties to have the order which they sought.

Thereupon there was a trial by the court, and a finding for the plaintiff, and that Prichard, and Keith, and Mrs. Cox were all co-sureties for Nicholds.

There was a motion by Mrs. Cox, and also by Prichard and Keith, separately, for a new trial.

The court overruled both motions, and rendered final judg-

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ment, ordering that Mrs. Cox, and Prichard, and Keith were all sureties for Nicholds, and that his property should be first exhausted by the sheriff before levy upon the property of said other defendants; but that there should be no suspension of said judgment or the enforcement thereof against said defendants, if such judgment should be obtained against Nicholds, but the plaintiff might have immediate execution for the collection of the judgment against the defendants.

It is assigned for error by Prichard and Keith, that the court erred in refusing them a new trial of the issue with reference to their suretyship; and for a specific error under this assignment, they allege the improper exclusion, by the court, of the evidence offered by them to prove that they executed the bond as the sureties of Cox and Nicholds. A bill of exceptions shows that the court did exclude this evidence on the ground that Mrs. Cox, as well as Prichard and Keith, was but a surety of Nicholds.

We cannot agree with the common pleas in its ruling on this point in the case. In the first place, Mrs. Cox had not alleged, in any pleading, that she was the surety of Nicholds; and in so finding, the court went outside of any issue or pleading in this case. And, in the second place, we think she was not a co-surety with Prichard and Keith, of Nicholds. We must look to the time of the execution of the bond, to learn what relation the parties assumed towards each other, and not to the time of the happening of some subsequent event. The view taken by the common pleas would make the question turn on what occurred after the execution of the bond. If Nicholds received the assets, then he would become principal, and Mrs. Cox would be surety; but if she succeeded in possessing herself of the assets, then she would be principal and he the surety; while Prichard and Keith would, contrary to their evident intention, in the one event, be the co-sureties with Cox for Nicholds, and in the other, the co-sureties with Nicholds for Cox.

We have nothing to decide on the assignment of error by

Mrs. Cox relating to the overruling of her motion for a new trial. She has no bill of exceptions in the record.

We need not decide what remedy she might have had against Nicholds, had he been in court, or what she may hereafter be entitled to against him.

The question as to the suretyship of one or more of the defendants should not, in any way, affect or delay the plaintiff. They can have the question tried at the time when the other issues in the case are tried, or at any time before or afterwards, or at a subsequent term. 2 G. & H. 308, sec. 674. If they do not get the question determined in season to make the order of any avail to them, it is their own fault or misfortune.

The judgment is affirmed, except as to the question of suretyship of Prichard and Keith, and as to that it is reversed, and the common pleas is directed to grant them a new trial as to that. Costs against Mrs. Cox.

S. Stansifer, R. Hill, and G. W. Richardson, for appellants.
F. T. Hord, for appellees.

34	140
128	538

34	140
130	260

34	140
149	180

34	140
162	490

34	140
171	256

CITY OF LAFAYETTE and Others *v.* FOWLER and Others.

CITY.—Street Improvement.—Change of Grade.—The common council of a city incorporated under the general act for the incorporation of cities may, by a two-thirds vote, without any petition, order the grade of a street which has been improved, such improvement having been paid for by the owners of the property bordering on such street, and is in good repair, to be changed, and cause the street to be reimproved with such change of grade, and pay the damages occasioned by the change out of the general revenue of the city, and assess the expense of the reimprovement against the owners of the adjoining property or cause such expense to be paid out of such general revenue.

SAME.—Extension of Time of Completion.—The mere extension by the common council of the time within which the contractors are to complete a street improvement will not constitute a ground for enjoining the collection of an assessment for such improvement.

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SAME.—*Length of Improvement.*—A street in a city incorporated under the general act for the incorporation of cities may be improved by grading, &c., for a greater length than one whole square, or block, under one order and one contract.

SAME.—*Estoppel.*—Where the owner of real estate in a city stands by and sees a street improved adjoining said property, on a contract made under an order of the common council, without attempting by injunction to prevent such improvement, he cannot, after the work is completed or nearly completed, refuse to pay for it.

APPEAL from the Tippecanoe Circuit Court.

DOWNEY, J.—Suit by Fowler, to which the other appellees afterwards became parties, against the city of Lafayette and Feely and Balfe, to enjoin the collection of certain assessments for street improvements, claimed by Feely and Balfe, the contractors.

The street in question had been graded and improved by the authority of the city, in 1859, and the cost of the improvement paid by the owners of the property on the street.

In 1867, the city, in consequence of the annexation of additional territory, extended the street, and besides fixing the grade of the new part of the street, ordered a change in the grade of the part which had been graded and improved in 1859.

After causing an assessment of the benefits and damages to the property affected, and tendering the amount of damages, they let a contract to Feely and Balfe, on the 10th of August, 1868, the cost of such change of grade and improvements to be assessed against the property fronting on the street. After the work was nearly completed, and precepts were about to be issued for the collection of the assessments, this suit was commenced. The appellees, other than Fowler, became parties to the suit by filing petitions containing that request and setting forth the same matters, in substance, as are in the complaint of Fowler. Fowler alleges as grounds for injunctive relief, first, that the change of the grade of the street is in violation of section twenty-seven of the law for the incorporation of cities, because there was no petition for the change of grade, without which, he contends, the

City of Lafayette and Others v. Fowler and Others.

council could not order the change, the act not allowing the cost of such change to be charged against him, but requiring it to be paid by the petitioners. Second, because the improvement ordered extends for more than one whole square between two streets crossing the improved street, to wit, four blocks; and that the city cannot improve more than one square, or block, in length, of a street, on the same order and contract, and that the order and contract in this case was in violation of section sixty-eight of said act. Third, that as the street had been once improved and paid for by the owners of the property bordering thereon, and was in good repair, the city had no power to make this improvement at the expense of said property holders, but that it can only be paid for out of the general fund. Fourth, one of the other complainants alleges a new reason for relief; and that is this: that the city council extended the time within which the contractors were to complete the work; and it is insisted that there should have been an abatement of the amount of the assessments on this account.

With reference to the first point, it must be allowed that if it had to be decided upon section twenty-seven alone, the position of the appellees might be well taken. The section relates to the duties of the civil engineer, and is as follows:

"Sec. 27. The civil engineer shall prepare plans, specifications and estimates, when thereunto directed by the common council, of proposed public improvements, and shall superintend the opening of streets and the preservation of the true lines thereof, and perform all other duties appertaining to his office and directed by the common council; and such engineer shall have exclusive jurisdiction to survey, determine, establish and perpetuate the lines and corners of all lots, blocks, parcels of land and subdivisions thereof within the limits of such city. He shall make a record of all such surveys as the county surveyor is now required to do; and such record, or certified copies thereof, shall have the same force and effect as the record of surveys made by the county surveyor has; and from all such surveys an appeal may be

taken, as provided for appeals from surveys made by the county surveyor: *Provided*, that when the city authorities have once established the grade of any street or alley in the city, such grade shall not be changed until the damages occasioned by such change shall have been assessed and tendered to the parties injured or affected by such change; and such damages shall be collected by the city from the party or parties asking such change of grade, in the manner provided for the collection of street improvements."

That part of section sixty-eight which bears upon this and the other questions is as follows:

"Sec. 68. When the owners of two thirds of the whole line of lots or parts of lots (and measuring only the front line of such lots as belong to persons resident in such city) bordering on any street or alley, consisting of one whole square between any two streets crossing the same, or if the common council deem it expedient, for any reasonable distance upon any square or alley, less than one whole square or block, shall petition the common council to have the sidewalks graded and paved, or the whole width of the street graded and paved, or for either kind of improvement, or for lighting such street according to the general plan of such improvement in said city, the common council may cause the same to be done, by contracts given to the best bidder, after advertising to receive proposals therefor; and the common council shall have power to compel the owner or owners of a lot, or a part of a lot, on any street or alley, or upon any part of any street or alley, to repair the sidewalks in front of their respective lots or parts of lots; and in case the owner or owners of any lot or part of lot, on any street or alley or any part thereof, fail or refuse to repair the sidewalks in front of their lots, the common council may cause such repairs to be made by the street commissioner, at the cost and expense of the owner or owners of such lot or lots; and the city shall have a lien on such lot or lots for the reimbursement to her of the cost of such improvement; and the common council are hereby invested with full powers to pass

by-laws and ordinances providing how and in what manner the repairs shall be made, and in what manner the same shall be assessed and collected from such owner or owners, and the manner in which the lien of the city for the expense incurred by her may be enforced against the lot or lots of such owner or owners."

Section sixty-eight evidently contemplates a petition to the city council, and the proviso to section twenty-seven also contemplates a case where the property owners initiate the work of improvement by a petition to the common council. If this were the only manner in which changes of grade and improvements of the streets could be brought about, the case would very clearly be with the appellees; but as it is not, we must see what further provision has been made, if any, for cases where there is no petition. The general authority of the city council over the streets is given by section sixty-one of the act. It, or so much thereof as it is necessary to quote, is as follows:

"Sec. 61. The common council shall have exclusive power over the streets, highways, alleys, and bridges, within such city, and may prescribe the height, and manner, and construction of all such bridges, and to lay out, survey, and open new streets and alleys, and straighten, widen, and otherwise alter, those already laid out, and to make repairs thereto, and to construct and establish sidewalks and crossings," &c.

The seventieth section of said act reads as follows:

"Sec. 70. When any such contract shall be made, or shall have been heretofore made, and shall have been in progress of fulfilment, the common council shall have power to cause estimates to be made from time to time, of the amount of work done by the contractors, and to require such amount to be paid to him, deducting a reasonable per centage to secure the completion of the contract, until the whole shall be finished, and to prescribe the time within which the whole shall be completed; and such estimate shall be a lien upon the ground upon which they are assessed, to the same ex-

tent that taxes are a lien, and shall have the same preference over other demands. The common council, with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the preceding section, and repairs of any kinds of streets and alleys to be made in like manner, without such petition, and either charge and cause any or all of the expenses thereof to be assessed and collected, as hereinafter provided when petition is made, or if is deemed just and right by the common council, cause such expenses, or any part thereof, to paid out of the general revenue of the city."

The word "hereinafter" in the last sentence of this section creates a little confusion, since the sections with reference to assessments of the benefits to property which is to be charged with improvements are prior in order to this one. It is quite evident that this section should be read as though the words, *in this act*, were used instead of the word "hereinafter." It seems also that the word "section," where it occurs in this part of the above section, should be in the plural, instead of the singular, as the section immediately preceding this makes no provision as to what improvements may be made, or how they are to be made. And then there is this further consideration with reference to this point, that the word "preceding" does not necessarily mean the next or immediately preceding. Section 68, as well as section 69, precedes section 70.

Section 70, we think, fully authorized the change of grade, without any petition, and authorized the city to pay the damages out of the general fund, and to assess and collect the expenses of the improvement from the owners of the property adjoining the street, or, at their option, to pay the same out of the general revenues of the city. If the construction contended for was correct, then the city could in no case change the grade of a street, except in cases where there was a petition. We think this construction is inadmissible.

The second ground assumed arises upon section 68, or
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that part of it above quoted. As we understand it, the position is, that if there is a length of street to be improved, extending for more than one square, it cannot be done by one order and one contract. No authority for such a construction is furnished, and as it is contrary to reason, we cannot adopt the construction. The language is not perspicuous. Perhaps it means that when the owners of two-thirds of the distance of at least one whole square, petition the city council, then the council has no discretion as to whether they will grant the petition or not, but must comply with the request; but if the distance be less than one whole square, then the council may order the improvement, if they deem it expedient, but are not absolutely bound to do so. We see no advantage to the city or to any person which would result from dividing up the work and letting it out to contractors by the square.

The third position is without authority to sustain it. The provision in section 70 above quoted authorizes the city to cause the expenses to be collected from the property holders, or to pay them out of the general fund.

There is nothing in the fourth position. The question of extension of the time within which the work should be completed was a matter between the council and the contractors. The appellees do not show that they were damaged thereby. If it was as they allege, that there should have been an abatement of fifty per cent. on account of the extension, they ought not to have been allowed to enjoin the collection of the remaining fifty per cent.

Another position in this case which is assumed by the appellant is, that the property owners could not stand by and see the improvement made without making any effort, by injunction, to prevent it, and then, after the work is done, or nearly done, refuse to pay for it. This rule has been applied by this court in several cases very similar to this one. *Hcllenkamp v. The City of Lafayette*, 30 Ind. 192; *Palmer v. Stumph*, 29 Ind. 329.

Wallace v. Walton.

The judgment is reversed, with costs, and the cause remanded, with directions to the circuit court to sustain the demurrer to the complaint.

J. R. Coffroth and *T. B. Ward*, for appellants.

WALLACE v. WALTON.

SUPREME COURT.—*Weight of Evidence.*—The Supreme Court will not, upon the weight of evidence, reverse a judgment, where the evidence is strongly conflicting.

APPEAL from the Marion Common Pleas.

PETTIT, C. J.—The appellant commenced this suit against the appellee, before a justice of the peace, on an account for brick sold and delivered. Trial before the justice; finding and judgment for the appellee; appeal to the said common pleas court. In that court, the cause was submitted for trial, with the request of the appellant that the court should find the facts specially, which was done; and there was a general finding and judgment for the appellee, and an appeal to this court. The principal question presented is as to whether the special findings are sustained by, and are in accord with, the weight of evidence. Without deciding whether we can or cannot inquire into this question for the purpose of setting aside or disregarding the special findings, we have carefully read, examined, and weighed the evidence; and finding that it is strongly conflicting, it is well and often settled by this court that we cannot reverse in such a case; but we will add that, in our opinion, the evidence strongly preponderates in favor of the findings and judgment of the court below.

The court did not err to the prejudice of the appellant, and the judgment is affirmed at his costs.

J. S. Harvey, for appellant.

B. K. Elliott and *C. L. Holstein*, for appellee.

Irvinson and Wife v. Van Riper.

IRVINSON and Wife v. VAN RIPER.

APPEAL.—Pleading Stricken Out.—Where a pleading has been erroneously stricken out, the error is not available on appeal if the same matter has been incorporated in an amended pleading afterwards filed and not rejected.

WAIVER.—Demurrer.—Reply.—Where a defendant voluntarily goes to trial without having made any question as to the state of the pleadings, he thereby waives the decision of the court upon a demurrer filed to a paragraph of his answer and undecided, and waives a reply not filed which otherwise might have been required.

APPEAL from the Vanderburgh Common Pleas.

DOWNER, J.—Action to foreclose a mortgage given to secure a note executed by Irvinson to Van Riper.

Answer in four paragraphs. Reply to the first and second. Demurrer to the third.

In this state of the pleadings, without disposing of the demurrer, and without any notice of the fourth paragraph, the case was tried by jury, and there was a verdict and judgment for the plaintiff, the court having overruled a motion for a new trial made by the defendants.

There was no motion for judgment on the pleadings, by the defendants, nor in arrest of judgment.

It is alleged as error, that the court below rejected the third paragraph of the defendants' original answer. But the same matter was embraced in the amended answer afterwards filed, which was not rejected. It has been held by this court that the action of the court in sustaining a demurrer to a pleading which is afterwards amended, cannot be assigned for error; and we think that rule is applicable also when there has been a motion sustained to strike out a pleading, and the same matter has been incorporated in an amended pleading afterwards filed. See *Patrick v. Jones*, 21 Ind. 249.

What issues had the court for trial? is a question which very naturally suggests itself. The appellants insist that, as the demurrer had not been disposed of, it was error to go to trial. But we do not find that this was objected to by them.

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We think that by consenting to go to trial without making any question with reference to the shape of the pleadings, the defendants waived the decision of the court upon the issue of law, and also waived the reply. See *Shirts v. Irons*, 28 Ind. 458, and cases therein cited.

The next error alleged is, that the court erred in rejecting certain evidence offered by the defendants in support of their answer. This proposed evidence is set out in the bill of exceptions. Some of it is oral, and some consists of documents. We have examined it, and think it had a tendency to support the answer, and should not have been excluded.

We cannot refrain from expressing the hope that the parties will succeed in getting the case in better shape before it shall again be submitted to the jury. To enable them to do so, the judgment is reversed, with costs, and the cause is remanded, with instructions to the common pleas to allow the parties to amend their pleadings, if they shall desire to do so.

J. S. Buchanan and H. C. Gooding, for appellants.

THE FIRST NATIONAL BANK OF MARTINSVILLE v. CANATSEY
and Others.

ATTORNEY'S FEES.—*Bill of Exchange*.—A stipulation in a bill of exchange for the payment of attorney's fees for collecting the bill is not usurious; and in a suit on the bill, the drawers, acceptors, and indorsers will be liable for reasonable attorney's fees.

APPEAL from the Morgan Circuit Court.

WORDEN, J.—This was an action by the appellant against the appellees, on a bill of exchange on which the defendants were liable as drawers, acceptors, and indorsers. The bill stipulated for the payment "of costs of collecting, including attorney's fees."

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There was judgment by default for the amount of the bill, and the court found specially that the reasonable attorney's fees for collecting the bill would be sixty-five dollars, but refused to allow the same or any part thereof, on the ground that the clause in the bill stipulating to pay the same was in violation of the law against usury. Exception was duly taken, and the case comes here on this question alone.

That such a contract is not usurious, is settled by the following cases in this court: *Gambril v. Doe*, 8 Blackf. 140; *Billingsley v. Dean*, 11 Ind. 331; *Smith v. Silvers*, 32 Ind. 321. In the case last cited, it was held that such a contract was not only not usurious, but so eminently just that there should be no hesitation in enforcing it. In the case of *Smith v. The Muncie National Bank*, 29 Ind. 158, it was decided that such a stipulation in a bill becomes a part of the contract of the acceptor.

We think the stipulation not void, and that the court erred in not allowing the reasonable attorney's fees as found.

The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

W. R. Harrison and W. S. Shirley, for appellant.

S. Claypool and F. P. A. Phelps, for appellees.

 PHELPS v. OSGOOD.

PRACTICE.—*Judgment taken Through Mistake, &c.*—Where proper cause is shown for relief from a judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect, under the act of March 4th, 1867, (3 Stat. 373) it is not in the discretion of the court to refuse the relief.

SAME.—*Affidavit.*—A cause at issue was called for trial, and neither the defendant nor his attorneys appearing, the default of the defendant was entered, and the cause was submitted to the court for trial. Finding and judgment for the plaintiff. Four days afterwards, during the same term, the defendant moved

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to set aside the default and judgment, and for a new trial, and filed in support of the motion the affidavit of one of his attorneys, who statated therein, that he was one of the attorneys of the defendant, naming another attorney as his associate counsel, that private business of his own required the absence of himself and his associate counsel, unexpectedly, in an adjoining county named, on Monday and Tuesday of that week; that the fact that this cause was set in the causes to be reached on one of these days, "owing to the confusion occasioned by the accident at the fair grounds," had escaped his observation; and it became necessary for him to start so early on Monday morning that he had no opportunity to see and engage some member of the bar to look after his cases generally in his absence; and hence he left himself and his client wholly unrepresented in this case on these two days; that from an examination of the facts in the case, affiant believed that the defendant had a good defense to at least a part of the cause of action, if not to the whole; that it was not by the fault of the defendant that the default was taken, but it was the affiant's fault if any one's, and was the result of circumstances he could not control.

Held, that the affidavit was insufficient.

SUPREME COURT.—*Transcript*.—*Certiorari*.—The proper mode of correcting errors and supplying deficiencies in the transcript of a cause in the Supreme Court is by making application to this court and by means of a *certiorari*.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—Osgood sued Kemper, Phelps, and Young on a promissory note. As to Young, the suit was dismissed. Kemper made default. Phelps answered. Demurrers were sustained to the third, fourth, fifth, and seventh paragraphs, and the second and sixth were stricken out on motion of the plaintiff. No question is made as to the correctness of the rulings of the court on the demurrers or on the motion to strike out. The first paragraph of the answer of Phelps was a general denial, and the eighth was a denial of the execution of the note, sworn to by Phelps.

With the issues thus made, the case was called for trial. Neither Phelps nor his counsel appeared. The default of Phelps was entered, and the cause was submitted to the court for trial. There was a finding and judgment for the plaintiff. This occurred on the 4th day of October, 1869.

On the 8th day of October, 1869, during the same term of the court, the defendant Phelps moved the court to set aside the default and judgment, and for a new trial. This

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motion was overruled, and an exception was taken; and this is the only question in the case

The motion was based on the affidavit of one of the attorneys of Phelps. He states that he is one of the attorneys of Phelps, naming his associate counsel; that private interest of his own required his absence and that of his associate counsel, unexpectedly, in Johnson county, on Monday and Tuesday of that week; that the fact that this case was set in the causes to be reached on one of those days, owing to the confusion occasioned by the accident at the fair grounds, had escaped his observation, and it became necessary for him to start so early on Monday morning that he had no opportunity to see and engage some member of the bar to look after his cases generally in his absence, and hence he left himself and his client wholly unrepresented in this case on those two days. From an examination of the facts in the case, affiant believes that the defendant Phelps has a good defense to at least a part of the note sued on, if not the whole amount thereof; that it was not the fault of Phelps that the default was taken, but was his fault if any one's, and was the result of circumstances he could not control.

It is insisted by counsel for the appellee, that section 99, 2 G. & H. 118, leaves it in the discretion of the court whether it will relieve a party from a judgment taken against him "through his mistake, inadvertence, surprise, or excusable neglect." But the learned counsel seem to have overlooked the amendment of that section in the act of March 4th, 1867. The section as amended provides, that the court "*shall* relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect." 3 Stat. 373; *Smith v. Noe*, 30 Ind. 117. The court, however, must necessarily decide upon the question whether or not the judgment was taken against the party through his mistake, inadvertence, surprise, or excusable neglect. If the court shall find that the judgment was so taken, it has no discretion to refuse the relief. The former decisions of this court on the question as to what is or is not such a mistake or such inad-

vertence, surprise, or excusable neglect, as will entitle the party to relief, are applicable under the section as amended; and the only change in this respect is, that when a case is found to be within the terms of the statute, the duty of the court is imperative, and not merely discretionary. Examining the affidavit, then, in the light of the former decisions of this court, it seems to us that it does not show a case within the statute.

It will be seen that though the deponent states that *he* did not observe that the cause was for trial at that time, he does not state that that fact had escaped the knowledge or observation of his associate or that of their client. What it was that had occurred at the fair grounds, which created the confusion referred to, or in what manner the deponent was connected therewith, we do not judicially know, and are not informed in the affidavit. Little importance can be attached to that part of the affidavit which refers to the deponent's having to start so early that he could not engage a substitute, since the fact that the case was for trial at that time had escaped his observation. An attorney is one who is put in the place or stead of another, to manage the cause for him. He is the agent of his client, and the want of care and the forgetfulness of the attorney must be imputed to the client. *Spaulding v. Thompson*, 12 Ind. 477. The private interests of attorneys are not ordinarily sufficient reason for their absence from court in which they have business requiring their attention.

Repeated decisions of this court show that in an application of this kind the applicant must show that he has a good defense, in whole or in part, to the action. We think that the statement of the deponent that from the examination of the facts he believed Phelps had a defense to a part, if not to all, of the note, might well have been considered by the common pleas as unsatisfactory. We are not informed that the affidavit of the client could not have been produced instead of asking the court to take the conclusion of the attorney. The facts with reference to the defense were what

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should have been shown to the court. *Goldsberry v. Carter*, 28 Ind. 59.

We think the common pleas committed no error in refusing to set aside the default.

Judgment affirmed, with two per cent. damages and costs.

ON PETITION FOR A REHEARING.

DOWNEY, J.—In a petition for a rehearing in this case, we are asked to settle a disputed question as to the condition of the transcript at a time prior to the submission of the cause. It is alleged by counsel for the appellant, that at that time the transcript did not show that the court below had overruled the demurrer to the eighth paragraph of the answer. It seems to be conceded by counsel for the appellee that they caused the transcript to be amended by the clerk of the common pleas, in the respect mentioned, after it was on file in this court, and before submission. It does not appear that any change was made in the record after the submission of the cause, nor do we think the case should have been differently decided if the change had not been made.

We must, however, express our disapprobation of the practice resorted to to correct the transcript, conceding that there was an error in it. The recognized mode of correcting errors and supplying deficiencies in the transcript is by application to this court, and by means of a *certiorari*.

The petition is overruled.

F. M. Finch and *J. A. Finch*, for appellant.

L. Barbour and *C. P. Jacobs*, for appellee.

CUMMINS v. SHIELDS and Others.

HIGHWAY.—*Proceeding to Lay Out*.—*Damages*.—A proceeding to lay out and establish a highway is not rendered erroneous by the fact that the damages, or

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a part thereof, assessed to a remonstrator, and ordered to be paid to him out of the county treasury, have been shown, during the progress of the proceeding, to have been paid into the treasury for the use of said remonstrator by a petitioner for such highway.

SAME.—Statute Construed.—It seems that the provision of the statute (1 G. & H. 363, sec. 16), that the viewers, in laying out or changing a highway, shall not run “through any person’s inclosure of one year’s standing, without the owner’s consent, unless, upon examination, a good way cannot otherwise be had,” is properly construed by adding thereto the words, *without departing essentially from the route petitioned for*.

SAME.—Remonstrance.—Waiver.—In a proceeding to lay out and establish a highway, a person filed with the board of county commissioners two remonstrances, the first relying upon the ground that the proposed highway was not of public utility; the second, upon the ground that it ran through his inclosed land, damaging him to the extent of a certain sum specified, and asking the appointment of reviewers to assess his damages; and no additional defense was set up during the progress of the proceeding.

Held, that these remonstrances raised no objection to the proposed highway on the ground that it would run through the remonstrator’s inclosure of one year’s standing, without his consent, and that a good way could otherwise be had; but, on the contrary, he thereby impliedly waived such objection.

APPEAL from the Jackson Circuit Court.

WORDEN, J.—This was a petition by Shields and others to the board of commissioners of Jackson county, for the laying out and establishing of a new highway described in the petition. Viewers were duly appointed by the board, who reported favorably; whereupon the appellant filed with the board two separate remonstrances, first, upon the ground that the proposed highway was not of public utility; and second, upon the ground that it would run through his improved and inclosed land, damaging him to the extent of three thousand dollars, and asking that reviewers be appointed to assess his damages. He did not, in his remonstrance or otherwise, so far as the record informs us, claim that the proposed highway run through his inclosure of one year’s standing, without his consent, and that a good way could otherwise be had, and therefore that it ought not to be laid through his land at all, but impliedly waived any objection of that sort, by failing to set it up, and by asking that his damages be assessed for thus laying the highway through his land. Upon the filing of

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these remonstrances, the board appointed reviewers, to review the proposed highway and report upon its utility, and to assess the damages of Cummins, if any, by reason of laying it out.

The reviewers reported that the highway was of public utility, and that it ran through the appellant's inclosure of one year's standing without his consent, but that upon a full and careful examination, a good way could not otherwise be had; and they assessed his damages at six hundred and fifty dollars. The board of commissioners thereupon ordered the highway to be laid out and established, the costs and damages to be paid out of the county treasury, it appearing that the damages had been paid into the county treasury for the use of the appellant.

From this order the appellant took his appeal to the circuit court, where the cause was tried by a jury.

The court submitted to the jury the following questions for their determination, viz.: "first, will the proposed highway be of public utility? second, if of public utility, will it be of any damage to the appellant, John J. Cummins? and if so, how much? third, will the proposed highway pass through the inclosure of said appellant, John J. Cummins, of one year's standing, without his consent? and if so, can a good road be otherwise had without departing essentially from the route petitioned for?" The appellant objected to that part of the last question which has reference to a departure from the route petitioned for. Overruled, and exception.

The jury returned the following answers: "first, we, the jury, agree that the said road will be of public utility; second, we, the jury, agree that the damage to said Cummins' farm is six hundred dollars; third, we, the jury, agree that the proposed highway will pass through the inclosure of the said John J. Cummins, of one year's standing, without his consent, and that a good road cannot be otherwise had without essentially departing from the route petitioned for."

These answers were all duly signed by the foreman. Cummins moved for a new trial, but his motion was overruled, and he excepted.

It was therefore adjudged by the court that the damages thus assessed and the costs be paid out of the county treasury, and that when paid, the road be established, recorded, and opened.

It appeared during the progress of the cause that one of the petitioners for the road paid into the county treasury a portion of the damages assessed in favor of the appellant, and objection is made to the proceedings on this account. We see nothing legally or morally wrong in a party desiring the establishment of a highway taking upon himself a part or all of the burthen of the damages assessed, by paying it into the treasury for the use of the party entitled to it; nor can we suppose such payment would have any influence with the court in determining whether the road was of sufficient importance to the public to order the costs and damages to be paid out of the county treasury.

It is argued quite earnestly and lengthily that the evidence did not sustain the finding of the court. We cannot, upon the well settled practice, disturb the finding in this case.

We come to the remaining and only important questions in the case, viz.: Did the court err in holding the law to be that a highway may be laid through an inclosure of a year's standing without the owner's consent, if a good way cannot otherwise be had, *without departing essentially from the route petitioned for?* and if so, was the error injurious to the appellant?

The statute provides that the viewers, in laying out or changing a highway, shall not run "through any person's inclosure of one year's standing, without the owner's consent, unless, upon examination, a good way cannot otherwise be had." 1 G. & H. 363, sec. 16. We are inclined to the opinion that the construction put upon the law by the court was correct, and that the words added by the court to the phraseology of the statute are only an expression of what the law implies. But we need not pass decisively upon this point, for the reason that if the court erred in this respect, it was an error that did the appellant no harm.

As the case stood before the court, there was no question involved, or in issue, as to the right of the petitioners to have the highway laid through an inclosure of a year's standing.

We have seen that in the papers filed before the commissioners there was no question of this sort made. On the contrary, it was waived by irresistible implication; for, instead of objecting to the road being laid through his land on account of running through his inclosure of a year's standing, he asks for damages on account of the road thus passing through his land, and that viewers be appointed to assess them. We do not mean to be understood as saying that he might not, in addition to his objection to the road as not being of public utility, and to his claim for damages, have also objected to the laying out of the road at all as petitioned for, on the ground that it would run through his protected inclosure, and that a good way could otherwise be had, but he did not do so. When he appeared before the commissioners and made his two points, the inutility of the road and his claim for damages, he waived all others, and the only questions the reviewers had legitimately to pass upon were the public utility of the road and the damages of the appellant, and all else in their report was unnecessary. There is no reason why, in the court of the county commissioners, a party shall be held to have the benefit of a defense that he does not make, any more than in any other court. When the case went to the circuit court, no additional papers were filed or defense set up, and the only questions in issue in that court were as to the public utility of the proposed road and the damages claimed. The petitioners would have been entitled to have the road laid out, although the third question put to the jury had not been put or answered.

The judgment below is affirmed, with costs.*

W. K. Marshall, D. H. Long, and J. W. Gordon, for appellant.

J. B. Brown, J. E. McDonald, J. M. Butler, and E. M. McDonald, for appellees.

* A petition for a rehearing was overruled, BUSKIRK, J., dissenting.

Eddy v. Beal.

EDDY v. BEAL.

REPLEVIN.—*Affidavit.*—*Justice of the Peace.*—In an action of replevin before a justice of the peace, though the complaint need not be separate from the affidavit, it may be; and where the defendant appears to the action and goes to trial on the merits, without objecting to the affidavit or the writ issued thereon, he cannot, on appeal to the court of common pleas, raise any objection to the affidavit as such, or to the writ.

SAME.—*Pleading.*—It seems that in an action of replevin before a justice of the peace, there is no necessity for the plaintiff's affidavit as such to state that he claims a judgment for the possession of the property, or that he demands damages for the detention thereof, though these statements will not vitiate the affidavit; and that the action of replevin may be maintained without asking damages for the detention of the property.

APPEAL from the Brown Common Pleas.

WORDEN, J.—Eddy sued Beal before a justice of the peace in an action of replevin for a plow, and filed a complaint that seems to be sufficient in form and substance, setting out the facts alleged, and demanding a judgment for a recovery of the property and fifty dollars damages for the detention thereof, which was duly signed by the plaintiff. He also filed a separate affidavit, which, as it appears from the record, was duly signed and verified by him, and contains all the requirements of the statute, including, like the complaint, a demand for a return of the property and for damages. A writ was issued and served, and the property was delivered to the plaintiff, he having given bond. On the return day of the writ, the parties appeared before the justice, and the defendant moved to dismiss the case because of the insufficiency of the complaint, which was overruled, and the plaintiff had leave to amend. What amendment was made, or whether any, does not appear.

On application of defendant, a change of venue was granted to another justice, and the time was fixed for trial. On the day fixed for trial, the parties appeared before the justice to whom the cause had been sent, and the defendant moved to dismiss the cause for the want of a sufficient transcript, which motion was overruled, and the parties thereupon entered upon

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the trial of the cause, which resulted in a judgment that the plaintiff keep the property and the defendant pay the costs. From this judgment the defendant appealed to the common pleas, where he filed what purports to be a plea, or answer, in abatement, asking that the writ be quashed and the action dismissed. A demurrer was overruled to this answer, and exception was taken, but the pleading need not be here set out, as our decision will turn upon the findings of the court thereon.

Issue was joined upon it and submitted to the court for trial. The court found the following facts specially: "That at the time the writ of replevin issued, the affidavit was sworn to, but not signed, by the plaintiff, and that there was no demand for possession or damages in said affidavit; that when the case was called for trial by the justice who issued the writ, the plaintiff amended his affidavit by signing the same and adding a demand for the possession of the property and for damages for the detention of the same; and that said affidavit was not thereafter sworn to."

On this finding the court rendered judgment for the defendant. Exceptions were duly taken.

This judgment cannot be sustained. We have seen that a good complaint was filed before the justice, claiming the property, and demanding damages in the sum of fifty dollars. The affidavit will, it is true, in such cases, answer for a complaint, but there is nothing in the law to prevent the filing of the complaint separate from the affidavit. There is nothing in the justices' act, providing for affidavits in such cases (2 G. & H. 598, sec. 71), that requires a party to swear in his affidavit, either that he claims a judgment for the property or demands damages for its detention. He may maintain such action for the recovery of property without asking damages for its detention. What he is required to swear to are the facts necessary to the issuing of the writ, that is to say, that his goods, &c., have been wrongfully taken, or are unlawfully detained, &c., describing and alleging the value thereof, and that they have not been taken by any execution, &c., or if so, that they were exempt, &c. What is said in

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the section in reference to claiming damages for the detention of the goods, not exceeding one hundred dollars, has reference to the jurisdiction of the justice, and should be construed to mean merely that the writ may be issued by the justice where the claim of damages for the detention of the goods does not exceed that sum.

The affidavit contained all the facts which the law required to be stated therein, and was in all respects complete and perfect at the time the writ was issued, except that it had not been then signed by the affiant, although it had been duly sworn to by him. It is claimed by counsel for the appellant that the affidavit was valid without being signed, and there are authorities to that effect. *Jackson v. Virgil*, 3 Johns. 540; *Shelton v. Berry*, 19 Texas, 154; *Crist v. Parks*, *id.* 234. Whether the signing was necessary, we need not determine, but we think the better practice would be to have all affidavits signed; nor need we determine whether the subsequent signing by the affiant, upon the calling of the cause, as found by the court, was such an amendment as the justice might have permitted. We may observe, however, that the insertion of the claim for damages and demand of the property, though unnecessary to be stated in the affidavit, viewed merely as an affidavit, did not vitiate it.

The record does not show that the defendant, before either of the justices, made any objection whatever to the affidavit, or to the writ; and it is not found by the court that any such objection was made. But it does appear by the record that the defendant appeared to the action, first before the justice before whom it was commenced, and obtained a change of venue, then before the justice to whom it was sent, and after making an ineffectual motion to dismiss for the want of a sufficient transcript, he entered upon the trial of the cause upon its merits.

This was an effectual waiver of all objections to the writ or the affidavit on which it issued. Many authorities might be cited upon this point, but we take up space only for the

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following: *Lewis v. Brackenridge*, 1 Blackf. 112; *Smith v. Emerson*, 16 Ind. 355.

There is nothing in the facts found by the court, that, under the circumstances, authorized a dismissal of the cause.

The judgment below is reversed, with costs, and the cause is remanded for further proceedings.

R. L. Coffey, for appellant.

J. S. Hester, S. E. Perkins, O. F. Baker, and S. E. Perkins, Jr., for appellee.

BUTT v. THE TOLEDO, WABASH, AND WESTERN RAILWAY CO.

SUPREME COURT.—*Weight of Evidence.*—The Supreme Court will not, upon the evidence, reverse a finding, where the evidence is conflicting, and consists entirely of the testimony of witnesses who testified in the presence of the court below.

APPEAL from the Miami Circuit Court.

PETTIT, C. J.—This suit was brought by the appellant against the appellee, to recover damages for killing stock on her railroad. The issues were regularly made; trial by the court, and finding and judgment for the defendant. Motion for a new trial overruled, exceptions, and appeal to this court. The only question before us in this record is the correctness of the finding of the court below on the evidence, all of which is in the record. The evidence was all oral and unwritten, and is conflicting and contradictory; and the judge who tried the case was better able to determine its strength, weight, and the reliability of witnesses than we are; and therefore we cannot reverse, but must affirm the judgment.

Judgment affirmed, at the costs of the appellant.

N. O. Ross and R. P. Effinger, for appellant.

W. Z. Stuart, for appellee.

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ADMINISTRATOR.—*Abatement*.—The right of a plaintiff to sue as executor or administrator can be called in question only by answer in abatement sworn to.

SAME.—*Mortgage*.—Where a mortgage is executed to one to secure money to be paid to another, the latter, if alive, can maintain a suit to foreclose the mortgage, and if he be dead, the action is properly brought by his administrator.

SAME.—*Minor*.—Where a mortgage was made to one, the money secured thereby being payable to another, a minor, who afterwards died before reaching majority;

Held, in a suit by the administrator of said minor to foreclose the mortgage, that the complaint was not bad for failing to allege that the minor accepted of and assented to the contract.

SAME.—Where a mortgage was given to secure the payment of money to one, at the time a minor, *when* he should arrive at the age of twenty-one years, and he died before reaching that age;

Held, that an action on the mortgage could be maintained by the personal representative of said minor, commenced at the time when the latter, if living, could have brought the suit.

FORECLOSURE.—*Pleading*.—*Description of Lands*.—Suit to foreclose a mortgage, the complaint alleging, that on, &c., the defendant conveyed, warranted, and mortgaged to, &c., certain tracts of land accurately described, to secure a debt evidenced by said mortgage, a copy of which was filed with the complaint, the only description of the land contained in the mortgage being, “ninety-nine acres and 76-100 this day deeded to him.” It was not further alleged that the land described in the complaint was the same as the land so described in the mortgage, or that it was the land described in the deed referred to in the mortgage; nor was said deed set out; nor was the description contained in said deed shown.

Held, on demurrer, that the complaint was bad for want of sufficient description of the land mortgaged.

APPEAL from the Dearborn Circuit Court.

BUSKIRK, J.—This was an action brought by the appellee against the appellant, to foreclose a mortgage on certain real estate situate in Dearborn county.

The complaint alleges that the appellant, on the 16th day of March, 1857, executed a mortgage, conveying to Frederick Nolte, deceased, a certain tract of land which is specifically described, as security for a debt evidenced by the said mortgage, a copy of which was filed with, and constituted a part of, the complaint; that the principal and interest of the

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said debt then amounted to eight hundred dollars, and that the same had not been paid to Frederick Nolte, in his lifetime, and that the same remains due and wholly unpaid; and that Frederick Nolte was, at the time of his death, under the age of twenty-one years, but that he would have been of the age of twenty-one years at the commencement of the action, if he were then living.

The mortgage filed with the complaint is dated the 16th of March, 1857, and so much thereof as is necessary for the purposes of the case under consideration reads as follows:

"I, Christian Nolte, Jr., mortgage and warrant to Christian Nolte, Sr., ninety-nine acres and $\frac{7}{10}$ of land this day deeded to him, to secure the payment of four hundred and fifty dollars, which is to be paid to Frederick Nolte when he arrives at the age of twenty-one years, and not to bear interest for two years from this date."

There are other stipulations in the mortgage, but they in no manner affect the questions involved in this case. The mortgage was properly executed and recorded. The appellant demurred to the complaint for the reason that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and proper exception was taken. The appellant refused to answer further, and thereupon the cause was submitted to the court for trial, and the evidence being heard, the court found that there was due on the said mortgage, from the appellant to the appellee, the sum of seven hundred and twelve dollars and fifty cents, and decreed a foreclosure of the mortgage, and the sale of the equity of redemption in and to the lands described in the complaint. There was no motion for a new trial. The evidence is not in the record.

The only question that is presented for the consideration and decision of this court is, whether the court erred in overruling the demurrer to the complaint.

The first objection urged to the complaint is, that there is no direct averment, in the complaint, of the death of Frederick Nolte, and that the appellee could not maintain an ac-

tion as administrator, without such averment. The question as to the legal capacity of the plaintiff to sue may be presented by demurrer and answer, but the question is not raised by a demurrer assigning for cause of demurrer the insufficiency of the complaint to constitute a cause of action. *Mandlove v. Lewis*, 9 Ind. 194; *Collins v. Nave*, *id.* 209. This is the rule where the action is not brought by an executor or administrator; but where the action is brought by an executor or administrator, his right to sue can only be called in question by a plea in abatement sworn to.

Section 151, 2 G. & H. 527, prescribes what actions may be brought by an executor or administrator. Section 152, 2 G. & H. 527, reads as follows: "In any suit contemplated by the preceding section, it shall not be necessary for such executor or administrator to make profert of his letters, nor shall his right to sue as such executor or administrator be questioned, unless the opposite party shall file a plea, denying such right, with his affidavit to the truth thereof thereunto attached; in which case a copy of the letters issued to such executor or administrator, duly authenticated, shall be all the evidence necessary to establish such right." There is nothing in this objection.

The next objection urged is, that the complaint charges that the mortgage was made to Frederick Nolte, and the mortgage filed with the complaint shows that it was executed to Christian Nolte, Sr., and that the administrator of Frederick cannot maintain an action thereon. The mortgage was executed to Christian Nolte, Sr., but the money was to be paid to Frederick Nolte. This made him the real party in interest, and if he was alive he could maintain the action, and being dead, the action is properly brought by his administrator. *Heavenridge, v. Mondy*, *ante*, p. 28.

The next objection urged to the complaint is, that the mortgage being executed to Christian Nolte, Sr., but the money being payable to Frederick Nolte, the consideration did not move from Frederick; and there being no allegation that Frederick ever accepted of or consented to the contract, his ad-

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ministrator cannot maintain the action. Frederick Nolte was a minor, and the contract being beneficial to him, the law raises a presumption that he accepted of, and assented to, the contract. If the law was otherwise, the appellant has no right to raise the objection.

It is next urged that no right of action exists on the mortgage, for the reason that the money was payable only on the condition that Frederick Nolte should live to be of the age of twenty-one years, and that, as he died before he arrived at the age of twenty-one years, his personal representative cannot maintain an action thereon. We do not think that this is the correct interpretation and construction of the mortgage. The mortgage declares that the money shall be paid *when* he arrives at the age of twenty-one years. This only designates the *time when*, and not the condition on which the money was to be payable. If Frederick Nolte were alive, he could maintain the action. The right of action did not die with him, but survived to his personal representative.

Redfield, Law of Wills, v. 2, ch. 2, § 16, 57, says: "The point which determines the vesting or lapsing of a legacy given *in futuro*, is not whether time is annexed to the gift, but whether it is annexed to the substance of the gift as a condition precedent, and that is to be determined, as a matter of intention, upon the whole will." See 2 Redf. on Wills, ch. 2, § 16, 54 to 63 and notes; 1 Perkins' Jarman on Wills, 758 and note; Williams Executors, 1083; *Patterson v. Ellis' Ex'rs*, 11 Wend. 259; *Andrews v. N. Y. Bible Society*, 4 Sandf. 156; *Young v. Stoner*, 37 Penn. St. 105; *Chew's Appeal*, *id.* 23; *Ross v. Drake*, *id.* 373; *Lantz v. Trusler*, *id.* 482.

The last objection urged to the complaint is, that the description of the land mortgaged is too vague and uncertain, and that the land described in the complaint is not alleged to be the land mortgaged. The only description of the land in the mortgage is, "ninety-nine acres and ⁷⁸/₁₀₀, this day deeded to him." It is not described by metes and bounds, or by the congressional survey; nor does it appear that the land is situated in Dearborn county, Indiana. This description is

wholly defective. The land should be described with such accuracy and particularity that the sheriff could put the purchaser in possession of the premises from the description. But it is claimed that the land is properly described in the complaint. We do not think so. The complaint says that the appellant conveyed, warranted, and mortgaged several tracts of land, an accurate and particular description of which is given, but it is not alleged that it is the same land mortgaged, or that it was the land described in the deed from Christian Nolte, Sr., to Christian Nolte, Jr., and which is referred to in the mortgage. The deed is not in the record, and we do not know what description it contains. If the land is properly described therein, and it is alleged and proved that the land described in the deed was the land mortgaged, this might make a proper description, but if such is not the case, then the mortgage would have to be reformed, which could be done in the proceeding to foreclose. But we hold that there is no proper and sufficient description of the land mortgaged, in the record, and for this reason the cause must be reversed. Upon this point we refer to the following authorities: *Whittelsey v. Beall*, 5 Blackf. 143; *Davis v. Cox*, 6 Ind. 481; *Hunter v. McCoy*, 14 Ind. 528; *Torr v. Torr*, 20 Ind. 118; and *Guy v. Barnes*, 24 Ind. 345.

The appellant insists that the judgment is erroneous for the reason that there was a personal judgment rendered against him, when there was no obligation for the payment of the money other than the mortgage. There was no motion for a new trial. The case comes here solely upon the ruling on the demurrer, and we can consider nothing that occurred subsequent to the overruling of the demurrer, in the condition of the record.

The judgment is reversed, with costs, and with directions to the court below to set aside all the proceedings subsequent to the overruling of the demurrer, to sustain the demurrer to the complaint, and for further proceedings in accordance to this opinion.

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PETTIT, C. J., dissents, for the reason that he holds that the money was to be paid to Frederick Nolte on the condition that he arrived at the age of twenty-one, that his arrival of age was a condition precedent to his right to receive the money, and that as he died before arriving of age, his personal representatives cannot recover.

W. S. Holman, for appellant.

D. S. Major and *A. B. Liddell*, for appellee.

WISHARD v. MEDARIS.

PARENT AND CHILD. — *Custody of Minor.* — *Indiana Soldiers and Seamen's Home.* — On the 6th of November, 1868, a minor, an orphan child of a deceased Indiana soldier, was received into the Indiana Soldiers and Seamen's Home, upon a written instrument signed by the mother of said child, reciting, that she thereby surrendered said child "to the care and guardianship" of the trustees of said Home, to be under the control of said trustees, to do with said child as they might think best for the interest of the child, without specifying any time during which the child should so remain.

Held, that in the absence of anything showing that the mother was not a suitable person to have the custody of the person of said minor, she was entitled to regain such custody at any time.

APPEAL from the Henry Circuit Court.

DOWNEY, J. — The question to be decided in this case arises upon a writ of *habeas corpus*, sued out by, and on the petition of, the appellee, the object of which was to obtain the custody of her children, alleged to be deprived of their liberty by the appellant.

The return of the appellant to the writ states, that he is the superintendent of the Indiana Soldiers and Seamen's Home; that the children are under twenty-one years of age; that they are the orphan children of James S. Medaris, who was a volunteer soldier in one of the Indiana regiments in the late war; that on the 6th day of November, 1868, the

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appellee, their mother and surviving parent, by an instrument of writing, filed therewith, surrendered to the care and guardianship of the trustees of the said soldiers' home, her said infants, to be cared for and educated as the wards of the said trustees, he the said appellant, being the superintendent of said Soldiers and Seamen's Home, and having charge of said minors by and under the authority of the said trustees, who derive their authority from the laws of the State of Indiana; and that his only authority for their custody and detention is the power vested in him by the said trustees and the laws of the State of Indiana.

The instrument, a copy of which is filed with the return is as follows:

"SOLDIERS AND SEAMEN'S HOME,
KNIGHTSTOWN, November 6th, 1868.

"Know all men by these presents, that I, Amanda Medaris, do hereby surrender to the care and guardianship of the trustees of the soldiers' home, William Robert Medaris and Flora E. Medaris, aged fourteen and five years, to be under the control of said trustees, to do with him and her as they may think best for the interests of the child.

Witnessed
by M. M. WISHARD." AMANDA MEDARIS.

The appellee excepted to the return for insufficiency. The circuit court held that it did not show legal and sufficient authority for the detention of the children, and ordered that they be discharged from the said Indiana Soldiers and Seamen's Home. There was an exception by the appellant, and an appeal taken to this court.

Referring to the act of March 11th, 1867, entitled "an act to establish a home for the maintenance of sick and disabled Indiana soldiers and seamen and their orphans and widows," 3 Ind. Stat. 494, we find the following provisions bearing on this question: Section 1 provides, that there shall be established at, &c., a home for the maintenance of sick and disabled Indiana soldiers and seamen, and their orphans and widows, &c.

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Section 2 provides, that the charge and management of said home shall be intrusted to a board of trustees, &c.

Section 9 provides, that the immediate direction of such home shall be under a competent and responsible principal, who shall be a surgeon, whose duty it shall be to superintend its several departments, &c.

Section 7 is as follows: "The trustees shall have power to adopt such regulations for the admission of, and discharge of persons who have entered the United States service, in the army or navy, as they may think proper: *provided*, that no one shall be admitted who has the means of support, and who has not been disabled in such service, or at the time of such application is not disabled and necessitous: *and provided, further*, that the widows and orphans of such persons from this State as have been in such service, and have not the means of livelihood, shall be admitted, and such admissions shall be in proportion to the number of soldiers furnished by each county, if there be more applications for admissions than can be accommodated, which apportionment shall be made by the trustees."

"Sec. 8. The necessitous persons admitted to the home shall be in the following order:

First. Totally disabled soldiers and seamen.

Second. Partially disabled soldiers and seamen.

Third. Orphans under fifteen years of age, of deceased soldiers and seamen, without father or mother.

Fourth. Orphans under fifteen years of age, of deceased soldiers and seamen whose mothers are living."

In the act of 1869, amending the act of 1867, 3 Ind. Stat. 498, sec. 3, it is provided, that "said trustees shall be deemed the legal guardians of the persons of all children entitled to admission to said home, who shall be voluntarily placed therein by their mothers, or in case they have no mothers, by other authorized persons; and when, in their judgment, it shall appear to the trustees to be for the interest of any such child, they may indenture him or her during minority," &c.

As these children were placed in the institution on the 6th day of November, 1868, prior to the enactment of the amendatory law of 1869, we think we must consider the case as governed by the law of 1867 exclusively.

We do not wish to be understood as deciding whether the fifth section of the act of 1869 is or is not valid as an amendment of the law with reference to guardians, or what would be the effect thereof if valid.

The sixth section of the act touching the relation of guardian and ward, 2 G. & H. 566, provides, that "every guardian so appointed" (that is as required by that act) "shall have the custody and tuition of such minor, and the management of such minor's estate during minority, unless sooner removed or discharged from such trust: *provided*, that the father of such minor, or if there be no father, the mother, if suitable persons respectively, shall have the custody of the person, and the control of the education of such minor."

We think we must presume, in the absence of any showing to the contrary, that the mother was, in this case, a suitable person to have the custody of the persons of her children, &c.

What, then, was the legal effect of the instrument of writing which she executed, and which is copied in the return? The statement in the writing, that the mother surrendered her children to the "care and guardianship of the trustees," did not have the effect to make the trustees the legal guardians of the children for two reasons: first, the mother was not authorized thus to appoint a guardian for them; and second, the trustees were not authorized to receive such appointment, or, in their corporate capacity, to act as guardians.

If the instrument in question is to be regarded in the character of a contract between the mother and the trustees, and if it be conceded that she might alienate her right to the custody and to control the education of her children, the question arises, for how long a time did she agree to part with such custody, &c.?

We think we cannot regard it anything more than a tem-

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porary arrangement, which either party might terminate at any time. The trustees were under no obligation by law, or by the agreement, to retain the custody of the children for any definite time; nor was the mother under any obligation to allow them to remain for any fixed period of time. See *The State, ex rel. Sharpe, v. Banks*, 25 Ind. 495, and cases there cited.

The judgment of the circuit court is affirmed, with costs.
M. L. Bundy, for appellant.

C. W. Smith, Jr., M. M. Ray, and J. A. Holman, for appellee.

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VENDOR AND PURCHASER.—*Incumbrances.*—*Promissory Note.*—*Assignment.*—

Consideration.—*Estoppel.*—Where, upon the sale and conveyance by warranty deed of real estate, it is agreed by the grantor, the grantee, the surety upon a note not payable in bank, given by said grantee and said surety to said grantor in consideration of said conveyance, and the holder of an outstanding mortgage on said real estate that said note shall be assigned by the payee to said mortgage creditor, who shall thereupon and in consideration thereof enter satisfaction of said mortgage, and said assignment is made and satisfaction is entered according to said agreement, it will not constitute a good defense to a suit on said note by said assignee against said maker and surety, that the maker, in order to prevent the sale of said real estate on execution, has been compelled to pay off a judgment for a greater sum than the amount of said note, existing, without his knowledge, at the date of said conveyance, and constituting a lien on said real estate junior to said mortgage, and that the grantor is insolvent and a non-resident of the State.

APPEAL from the Morgan Circuit Court.

PETTIT, C. J.—Suit by the appellant against the appellees on a promissory note (not payable in bank) payable to one Cord, and by him assigned to William Brewer, and by him to Henry Brewer, the plaintiff below and appellant here.

The defendants by answer admitted that they executed the

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note sued on, but alleged that Parker executed the note as principal, and that the other defendant, John Brown, executed it as surety of Parker; that the note was given in consideration of the sale and conveyance by warranty deed, covenanting against all incumbrances, by said Cord to said Parker, of a certain piece of real estate (the deed being made a part of the answer); that at the time of making said deed there was an incumbrance upon the real estate, unknown to the defendant Parker, of a judgment against Cord, in the circuit court of the county in which the real estate was situate, for a greater sum than the note; that to prevent the sale on execution of said real estate, the said Parker was compelled to and did pay off and satisfy said judgment; that Cord was not a resident of the State, and was wholly insolvent.

The plaintiff replied, that at and before the date of the note, and before the sale of the land, there was an outstanding mortgage given by said Cord to William Brewer, to secure the payment of four hundred dollars for purchase-money for said real estate; that the mortgage was, before the date of the note sued on, for a valuable consideration, assigned by said William Brewer to the plaintiff; that the plaintiff was, before the sale of the land by Cord to defendant Parker, the owner of said mortgage, which was a lien on the land prior to the judgment lien mentioned in the answer; that before the sale of said land by Cord to Parker, it was agreed by and between Parker, Cord, and plaintiff, and the defendant Brown, that in consideration of the plaintiff's releasing his said mortgage lien upon the land, the said Cord might and would transfer the note sued on to the plaintiff; that pursuant to said agreement, and with the knowledge, procurement, consent, and direction of Parker, the plaintiff released his mortgage lien, and the said Cord transferred the note sued on to the plaintiff, in consideration of the plaintiff's having released his mortgage lien; and that Parker refused to purchase the land unless the plaintiff would release his

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mortgage in consideration of the assignment to him by Cord of the note sued on.

The defendants demurred to the reply, because it did not contain sufficient facts, &c., and the court sustained the demurrer, which ruling was excepted to.

The only question before us in this case is the correctness of this ruling on the demurrer. We think that this was so clearly a good reply that we must reverse the judgment. We cannot conceive how a reply could more thoroughly or perfectly estop the defendants from setting up the defense stated in their answer. *Williams v. Rank*, 1 Ind. 230; *Morrison v. Weaver*, 16 Ind. 344.

The judgment is reversed, at the costs of the appellee; cause remanded, &c.

S. Claypool and F. P. A. Phelps, for appellant.

A. Ennis, for appellees.

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34	174
127	258
34	174
149	156
34	174
167	275

CONTRACT.—*Separate Instruments of Different Dates.*—Suit on a bond conditioned in the alternative, that the principal obligor should, on a certain day, pay the plaintiff a certain sum, or in lieu thereof, at his own election, secure to the plaintiff on that day a clear title and the possession of certain real estate. Answer, setting up a written agreement alleged to have been made at the time of the making of the contract mentioned in the complaint and as a part thereof, but bearing a different date, whereby the plaintiff agreed that he would, on, &c., being the day fixed in said bond for the performance of the condition thereof, convey a certain farm to said principal obligor, the answer alleging that the plaintiff had failed and refused to so convey said farm, &c.

Held, that upon demurrer to said answer, the instrument therein set out should, notwithstanding the expressed date thereof, be regarded as having been executed at the same time that said bond was executed, and be considered as a part of the same contract.

Held, also, that the failure of the plaintiff alleged in the answer constituted a bar to the suit on the bond.

SAME.—*Alternative Modes of Performance.*—Under a bond so conditioned, the right of the obligor to elect between the alternative modes of performance

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ceases after the date fixed for performance by the bond. No mere notice given by the obligor to the obligee, of the mode in which the former elects to perform, is conclusive on the latter, and no demand by the obligee for a deed is necessary to entitle him to recover the money.

PLEADING.—Tender.—An answer, pleaded in form in bar of an action generally, setting up a tender alleged to have been made after the filing of the plaintiff's complaint, without expressly showing that the action had been commenced, though asking judgment for costs only from the time of making the tender, is bad on demurrer.

APPEAL from the Gibson Common Pleas.

DOWNEY, J.—Ireland sued Montgomery and McQuade on a writing obligatory, dated January 3d, 1867, in the penalty of three thousand dollars, which recited that Ireland had sold to Montgomery his farm, for which Montgomery had agreed to pay one hundred dollars cash, a promissory note for two hundred and sixty dollars, due December 25th, 1868, with interest, and to elect between paying to Ireland on the 5th day of October, 1868, twenty-two hundred dollars, or securing to him a clear title and possession, on that day, to the north half of inlot thirteen, in the original plat of the town of Owensville, in Gibson county, the sheriff's certificate of sale of which he had assigned to Ireland on the day the contract was made; or, if said property should be redeemed before October 5th, then Montgomery need only pay to Ireland the said note, on which a credit of one hundred dollars should be given, and might retain all title and interest in said land, which would otherwise have remained in said Ireland; and was conditioned that if Montgomery should comply with and fulfill said agreement, then this obligation should be void, otherwise in full force. It is then alleged, that though it was agreed that the sheriff's certificate should be assigned by Montgomery to Ireland, yet, by mistake, it was not done, but remained in possession of Montgomery; that the real estate was not redeemed before or on October 5th, 1868; that the plaintiff had performed all the stipulations in the contract on his part to be performed, and was ready and willing, on the said 5th day of October, 1868, to receive from Montgomery the said sum of twenty-two hundred dollars,

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or, in lieu thereof, the title and possession of the said real estate; that Montgomery failed, on the day named, to perform either of the alternative stipulations, and still refuses; that the plaintiff sought for Montgomery on the 5th day of October, 1868, to demand the same, but was unable to find him; that he did find him and made the demand on the next day, and has since made the demand of him on divers days.

The defendants answered in five paragraphs. The plaintiff demurred to the first, third, fourth, and fifth paragraphs, and the demurrers were overruled, and exceptions entered. No notice seems to have been taken of the second, nor is any question with reference to it presented here. The plaintiff refusing further to reply to the defendants' answer, judgment was rendered for the defendants, that they go hence and recover their costs.

The errors assigned are, that the court erred in overruling the demurrers, and in giving judgment for the defendant.

The first paragraph states, that at the time of making the contract mentioned in the complaint; and as a part of said contract, Ireland executed to Montgomery a writing obligatory, as follows: "This agreement, made the 3d day of January, 1868, between George C. Ireland, of Gibson county," &c., "of the first part, and Garrard M. Montgomery, of," &c., "of the second part, witnesseth, that the said Ireland agrees and covenants that on the 5th day of October, 1868, he will make to said Montgomery, his heirs and assigns, a good warranty deed to the following described real estate, in," &c., to wit: part of the south half of the south-east quarter of section eighteen, in township two, range nine, containing seventy acres; and also part of the west part of the south-west quarter of section seventeen, same township and range, containing six acres. The said deed to be given in case said Montgomery fulfills the following terms of payment, to wit: one hundred dollars cash, four hundred and sixty dollars on the 25th of December, A. D. 1868, to be on interest at six per cent., and either the redemption money of the following real estate, to wit: the north half of inlot thir-

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teen, in the town of Owensville, &c., which has been sold by the sheriff, on or before the 5th day of October, A. D. 1868, in which case said note shall be credited one hundred dollars, or secure said Ireland in the clear title and possession thereof at said date; or, if he elect, pay him instead the sum of twenty-two hundred dollars; also, that in case said property shall come to said Ireland, then said Montgomery is to secure to him all shelves and counters in the house thereon. Witness, &c., this 3d day of January, 1868, &c.

G. C. IRELAND.

Attest: C. A. BUSKIRK."

But said plaintiff has failed and refused to comply with the conditions of said contract or writing obligatory, in this, to wit: that said plaintiff has wholly failed and refused to make and execute to the said defendant a good and sufficient deed for the lands sold to him by said plaintiff and described in said writing obligatory, as by the terms of said contract he was bound to do.

The question is discussed by counsel in their briefs, as to whether it can be alleged, in opposition to the expressed date of the instrument, that it was really executed at the same time that the bond set out in the complaint was executed, and as a part of one and the same contract.

Such an instrument takes effect only from the time of its delivery. It would be valid without any date, or with a wrong or impossible date. We think the pleading was not objectionable on this ground.

For the purpose, then, of judging of the sufficiency of the paragraph in question, we must regard it as true, as alleged, that the two instruments were executed at the same time, and that they constitute but one contract. See *Allen v. Nofsinger*, 13 Ind. 494; *Judah v. Zimmerman*, 22 Ind. 388.

A question is made as to whether Ireland was bound to execute the deed to Montgomery on the 5th of October, or not until the 25th of December, when the note for two hundred and sixty dollars matured. The deed was to be made

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on the 5th of October, in case Montgomery fulfilled the terms mentioned. We construe this to mean that Montgomery should do the acts which were to be done on or before October 5th, to entitle himself to a deed at that time, but was not obliged to wait for the deed until after the maturity and payment of the note falling due December 25th.

Looking at the two instruments as one contract, it seems to us that the appellant was bound to execute and deliver, or tender, a deed for the farm which he had sold to the appellee Montgomery, before he could maintain an action against him for the non-performance of the acts which Montgomery was to perform at the same time, as the consideration for such conveyance; and as the paragraph in question alleges that he did not do so, it is a good bar to the action. See 1 Davis' Indiana Digest, title Vendor and Purchaser, secs. 24 and 36.

The third paragraph alleges, that, on the 23d day of October, 1868, and after the filing of the plaintiff's complaint, the appellee Montgomery tendered to the appellant a good and sufficient deed in fee simple, for the real estate in the complaint mentioned, which he refused to accept, which deed he alleges he brings into court for the use of the plaintiff, and that he has, at all times, been ready to put the appellant in possession of said property; and asks that the appellant be required to execute a deed to the appellee, and if the appellant shall fail to do so, that a commission be appointed to execute the deed, and that he recover costs after the date of the tender.

This paragraph does not inform us, expressly, whether the process had been issued on the complaint or not. It is the issuing of the summons which constitutes the commencement of the action, except where publication is made. 2 G. & H. 59, sec. 34.

We think, however, taking all parts of the paragraph into consideration, that we ought to hold, against the pleader, that the summons had issued, and that the suit was therefore commenced, before the deed was tendered. Taking this view of it, we think the answer was objectionable because it was pleaded in bar of the action generally, and not in bar of the

further maintenance of the action. While the appellee claims costs only from the time of making the tender, his answer is yet in bar of all costs. While it tacitly concedes a right to commence the action, and to maintain it until the time of the tender, it is pleaded, in form, in bar of the action from its commencement, and in bar of all costs.

But there is another, and, perhaps, a more substantial objection to the paragraph. By the terms of the bond set out in the complaint, the appellee had the option, until the 5th of October, 1868, whether he would convey the real estate, or pay the twenty-two hundred dollars; but afterwards he had no such option. In *Duerson v. Bellows*, 1 Blackf. 217, which was an action on a writing obligatory for the payment of five hundred dollars lawful money, or good current paper, on or before a certain day, this court say, "This contract, being in the disjunctive, the obligors, as the first agents, had an election to discharge the obligation by paying the amount on the day when due, either in lawful money or good current paper, according to their own interest or convenience. But when the time fixed on for the payment was past, the privilege of election belonged to the obligee, and he then had the right to choose for which he would bring his action. Co. Litt. 145. In the present suit, the plaintiff below goes for the lawful money mentioned in the obligation, assigning as a breach, the non-performance of either part of the contract; he was justified by the law in doing so, and the action of debt was his proper remedy."

The case of *Fretageot v. Owen*, 7 Blackf. 231, is, we think, very much in point. It was on an obligation by which the defendants agreed to pay two thousand dollars, or convey certain real estate, on a specified day. Breach, that they had not paid the money or conveyed the land. It was held, relying on the authority of the case in 1 Blackf. *supra*, that the defendants were liable for the money, not having executed the deed within the specified time. See, also, *Mason v. Toner*, 6 Ind. 328.

We think the third paragraph was not a good defense to

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the action, and that the demurrer to it should have been sustained.

The fourth paragraph alleges, that the appellant did not, at any time before the bringing of the suit, demand a deed from the appellee, and that he has been ready to convey. We think the paragraph is bad, for the reasons given above. The time was fixed when the deed was to be made, if the appellee elected to convey the land, and no demand of a deed was necessary to enable the appellant to recover the money. The appellee had his election; he was the party who was first to act, by making his election, and by doing or offering to do the one thing or the other. The appellant had nothing to do but to perform his part of the contract, after the appellee had made choice of which of the two things he would do. Upon his failing to make the title to the real estate, the claim resolved itself into a demand for money.

The fifth paragraph alleges, that, on and prior to October 5th, 1868, Montgomery had informed Ireland, and that Ireland well knew, that he had elected not to pay the twenty-two hundred dollars, but to convey the real estate.

This paragraph is also bad. Mere notice of his election was not sufficient. We think he should have executed the deed for the real estate and delivered, or offered to deliver it, upon Ireland, at the same time, executing to him the deed which he was to make for the farm. But, as we have held the first paragraph of the answer good, we must affirm the judgment.

Judgment affirmed, with costs.

W. M. Land, for appellant.

A. C. Donald and *J. E. Phillips*, for appellees.

WILDER and Another v. WEAKLEY's Estate.

UN SOUNDNESS OF MIND.—*Contract.—Statute Construed.*—The statutory provision, that “every contract, sale, or conveyance of any person, while a person of unsound mind shall be void,” 2 G. & H. 575, sec. 11, is applicable only to a person who has been found to be *non compos mentis* in the manner prescribed by statute.

SAME.—*Sale.*—Where goods are sold to a person apparently of sound mind, who is not known by the seller to be otherwise, and who has not been found to be otherwise by a proper proceeding for that purpose, and the contract is fair and *bona fide*, and the purchaser receives and uses the goods, whereby the contract becomes so far executed that the parties cannot be placed *in statu quo*, such contract cannot afterwards be set aside because of the unsoundness of mind of said purchaser at the time of the sale, nor can payment for the goods be refused, either by the alleged lunatic or his representatives.

SAME.—*Pleading.*—In an action to recover the price of goods sold, if, at the time of the sale, the purchaser had been duly found to be of unsound mind by a proper proceeding for that purpose, this fact is matter of defense; and it does not devolve on the plaintiff to allege the contrary in anticipation.

APPEAL from the Miami Common Pleas.

WORDEN, J.—The appellants filed their claim, duly verified, against the estate of Thomas Weakley, deceased, consisting of an account for liquors, such as whisky, brandy, gin, rum, wine, and kimmel, sold and delivered in the year 1865, amounting to the sum of six hundred and fifty-eight dollars and seventy-five cents, giving credit for cash paid thereon to the amount of four hundred dollars, and claiming a balance due thereon of the sum of two hundred and fifty-eight dollars and seventy-five cents.

To this account James M. Brown, the administrator, pleaded as follows:

“Comes now James M. Brown, the administrator of the estate of Thomas Weakley, deceased, and answering the plaintiff's complaint in this behalf, says that the said Thomas Weakley, at the time the account sued on accrued, and for a long time previous thereto, was a person of unsound mind (an imbecile) and wholly incapable of making a contract or transacting any business whatever; and that the mental condition of the said Thomas Weakley was then and there well known to the plaintiffs.”

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To this answer the plaintiffs replied in three paragraphs. The first paragraph of the reply avers, amongst other things, the following facts: That at the time of the purchasing of the goods, for five years before, and for six months thereafter, the said Thomas Weakley was the owner and proprietor of a large public hotel in the city of Peru, known as the Weakley house, in which a public bar was kept for the purpose of retailing spiritous liquors by the glass; that during all this time, the said Thomas Weakley was the owner and proprietor of said hotel and bar, and by his agents operating and running the same; that at the time of the sale and delivery of the goods, the plaintiff had no knowledge of any insanity or mental imbecility of the said Thomas Weakley; that during the time, &c., the said Thomas Weakley, by his family and other agents, was selling spirituous liquors by retail under a license to said Thomas from the board of commissioners of the county; that no inquest of lunacy had been held on said Thomas, and no guardian had been appointed to manage his estate until long after the sale and purchase of said goods, and that said goods were necessary in running said bar, &c.

The second paragraph of the reply alleges, amongst other things, that at the time of the sale of the goods, the plaintiff had no knowledge of the insanity or imbecility of said Thomas; that the goods were received by the family of said Thomas and sold out at retail, and the proceeds thereof went to the benefit of said estate.

The third paragraph of the reply is a general denial of the answer.

The court sustained a demurrer to the first and second paragraphs of the replication, to which ruling the plaintiffs excepted. Thereupon the plaintiffs were ruled to answer (reply) further, and failing to do so, it was ordered by the court that judgment be rendered against them, which was done, and the plaintiffs excepted.

It was error, perhaps inadvertently committed, to render judgment against the plaintiff, for failing to make further reply to the answer, as long as they had in a denial thereof; that

denial put the defendant upon proof of his answer, and the plaintiffs could not be rightfully turned out of court without a trial of the issue thus made.

We are also of the opinion that the court erred in sustaining the demurrer to the first and second paragraphs of the replication.

We have the following statutory provision: "Every contract, sale, or conveyance, of any person, while a person of unsound mind shall be void." 2 G. & H. 575, sec. 11.

This provision has little or nothing to do with the question involved here, for the reason that it is applicable to a person only who has been found to be *non compos* in the manner prescribed by the statute. This was settled by the case of *Crouse v. Holman*, 19 Ind. 30. The case before us must be settled on general principles of law.

It has long been established that a lunatic, like an infant, is liable for necessities suitable to his condition in life. But the more modern authorities go much further. It is laid down by an elementary writer, that, "if a party to a contract was, at the time he entered into the engagement, a lunatic or of unsound mind, and any imposition appears to have been practiced upon him, or any advantage taken of his infirmity by the other contracting parties, the contract will be void as having been procured by fraud; but if the contract is a fair and honest contract, and bears no symptoms of the infirmity, of mind of the party sought to be charged thereon, the courts will enforce it like any other contract. * * * An action for the price of goods sold and delivered, or of work done, or for the hire of horses, carriages, or servants, cannot be defeated by showing that the defendant had been found by inquisition to be a lunatic at the time he received the goods, or had the benefit of the work, or the use of the horses, carriages, and servants; for the law will not permit the lunatic's infirmity to be made an instrument of fraud upon third parties who have dealt with him in good faith. If a lunatic, apparently of sound mind and not known to be otherwise, enters into a fair and *bona fide* contract, such contract cannot

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afterwards be set aside." Addison Con. (6th ed.) 1033-4. Many authorities upon this point are collected by Rawle, in Smith on Con. (5th ed.) 343-4. Among the cases, especially in point, are *La Rue v. Gilkyson*, 4 Penn. St. 375, and *Beals v. See*, 10 *id.* 56.

We think it may be safely stated, both on principle and authority, that where a person apparently of sound mind, and not known to be otherwise, and who has not been found to be otherwise by proper proceedings for that purpose, fairly and *bona fide* purchases property and receives and uses the same, whereby the contract of purchase becomes so far executed that the parties cannot be placed *in statu quo*, such contract cannot afterwards be set aside, or payment for the goods be refused, either by the alleged lunatic or his representatives.

Applying this doctrine to the first paragraph of the replication, it seems to be abundantly good. The plaintiffs, it is averred, had no knowledge of Weakley's lunacy. The goods sold are such as he was using in his daily business; no suspicion of fraud is excited by a transaction unusual or extraordinary in its character, for this was quite in the ordinary course of business. No inquest of lunacy had been held on Weakley; he had the benefit of the goods; and, if the replication be true, there is no reason in law or sound morals why the estate should not pay what the goods are reasonably worth.

The second paragraph of the replication, we think, is also good. That paragraph alleges a want of all knowledge of Weakley's lunacy; that the goods were received and sold out, and went to the benefit of the estate. This paragraph does not allege that no inquest had been held on Weakley; but we are of opinion that if Weakley, at the time of the sale of the goods, had been duly found to be a lunatic on proceedings for that purpose, it was a fact that should have been averred by the defendant.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to overrule

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the demurrer to the first and second paragraphs of the reply.

H. I. Sherk and *J. Mitchell*, for appellants.

J. M. Brown and *J. M. Wilson*, for appellee.

THE LAFAYETTE, MUNCIE, AND BLOOMINGTON RAIL ROAD COMPANY and Another v. GEIGER.

CONSTITUTIONAL LAW.—*Legislative Power*.—When the constitution of a state vests in the General Assembly all legislative power, as does ours (article 5, section 1), it is to be construed as a general grant of power, and as authorizing such legislature to pass any law within the ordinary functions of legislation, if not delegated to the federal government or prohibited by the state constitution.

SAME.—*Construction*.—*Constitutions and Statutes*.—Constitutions are to receive a strict construction, and acts of the legislature are to be liberally construed.

SAME.—“*Incorporated Company*.”—The words “incorporated company” in section 6 of article 10 of the constitution of this State, refer to those associations which are created for public benefit, and to which the government delegates a portion of its sovereign power, to be exercised for public utility,—such as turnpike, bridge, canal, and railroad companies.

SAME.—*Subscription for Railroad Stock by County*.—By the general grant of legislative power, the General Assembly of this State is empowered to authorize counties to subscribe for stock in railroad companies, and section 6 of article 10 of the constitution recognizes this power, and so limits it as to prevent such subscription unless the stock be paid for in money at the time of the subscription. A county cannot subscribe for such stock without appropriate affirmative legislation authorizing it.

SAME.—*Act of 1869*.—The authority granted by the Act of May 12th, 1869 (Acts 1869, p. 92), to counties to subscribe for stock in railroad companies, to be paid for at the time of the subscription, is a legitimate exercise of the power conferred on the legislature by section 1 of article 5 and section 6 of article 10 of the constitution; and the means provided in said act to raise the money with which to pay for said stock are appropriate, plainly conducive to the end proposed, and not prohibited by the constitution or inconsistent with the letter or spirit thereof.

SAME.—“*Taking Effect*.”—The fact that a vote of the people is necessary to carry the provisions of said act of 1869 into execution, does not render the

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84	185
130	500
84	185
131	478
84	185
135	536
136	585
84	185
137	480
84	185
141	639
84	185
151	266
84	185
156	166
156	166
84	185
157	523
84	185
161	255
162	594
162	602
84	185
166	180
168	100

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taking effect of the act dependent upon any authority other than the legislative power of the General Assembly, and therefore does not render the act in conflict with section 25 of article I of the constitution.

SAME.—General and Local Laws.—County Commissioners.—Said act is not in conflict with the constitutional restriction upon the enactment of local or special laws; and it is in accord with the provision of the constitution authorizing the legislature to confer upon county boards powers of a local administrative character.

SAME.—Rate of Assessment and Taxation.—Said act is not in conflict with the constitutional requirement that "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation," the rate in each county in which an appropriation is made under said act being uniform and equal throughout such county.

ELECTION.—Change of Voting Places.—Inspector's Return.—Notice of Election.—An election under said act, resulting in favor of the making of an appropriation by a county in aid of the construction of a certain railroad, there being no fraud, no legal voter being prevented from voting, and no illegal voter being permitted to vote, it was *held*, was not rendered illegal by the facts that the county commissioners changed the places of voting, in one of the townships, two days before such election, of which change no notice was given to the voters; that the inspectors in two of the townships made no return of the votes taken therein, where, if the whole number of votes in said townships had been cast against the appropriation, there would still have been a clear majority of all the votes cast in the county in favor of the appropriation; and that the question submitted to the voters of the county was for or against a subscription of stock in said railroad by said county, a resolution adopted by the commissioners when they ordered a vote to be taken being published in the election notice, to the effect that if the vote of the county should be in favor of an appropriation, they would subscribe for stock in said railroad company, for and on behalf of said county, and the question of *donating* money to aid in the construction of said railroad not being submitted in said notice.

APPEAL from the Tippecanoe Common Pleas.

BUSKIRK, J.—This case presents, for our consideration and decision, the constitutionality and validity of an act entitled "an act to authorize aid to the construction of railroads by counties and townships taking stock in, and making donations to, railroad companies" (approved May 12th, 1869), and the regularity and legality of the proceedings had, under such act, by the Board of Commissioners of Tippecanoe County.

The record shows the following facts :

Geiger's complaint against the Lafayette, Muncie, and

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Bloomington Railroad Company and Andrew J. Castater, as Auditor of Tippecanoe county, states that he, Geiger, is the owner of real and personal property in said county, subject to taxation to the amount of ten thousand dollars and over; that on the 20th day of July, 1869, at a special session of the board of commissioners of said county, a petition, signed by over one hundred freeholders, was presented and filed with the board, in these words:

“To the Honorable, the Board of Commissioners of the County of Tippecanoe, in the State of Indiana: The undersigned, freeholders of said county, respectfully petition your honorable board to make an appropriation of money to aid the Lafayette, Muncie, and Bloomington Railroad Company in the construction of its railroad through said county, by taking stock in, or donating money to, said company, to the amount of three hundred and seventy-three thousand dollars.

“Dated, Lafayette, Indiana, July 15th, 1869.”

It is then averred that the commissioners, acting under the law of May 12th, 1869, entitled “an act to authorize aid to the construction of railroads by counties and townships taking stock in, and making donations to, railroad companies,” upon the filing of said petition, made the following order, to wit:

“Said board, after taking said petition under advisement, and after being fully advised, do order the polls of the several and respective voting places and precincts be opened upon Saturday, the 28th day of August, 1869, and the votes of the legal voters of said county be taken for or against the appropriating of the money by the said county, for the purpose of aiding in the construction of the said Lafayette, Muncie, and Bloomington Railroad, as prayed for in said petition, by taking stock in said company, and that the auditor give due and legal notice to the qualified voters of said county of the opening of the polls pursuant to this order.

“And it is further ordered and declared that it is the opinion and judgment of said board that the appropriation asked for by said petition, to aid in the construction of said railroad,

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should be made by taking stock in said railroad company, and not by donation, and that when said assessment is made, should the same be voted for on said 28th day of August, 1869, then, after the same is made and paid in, at the proper time, said board will aid in the construction of said railroad by taking stock therein."

The complaint then avers that the auditor, in compliance with this order, published in the Lafayette Daily Courier and in the Lafayette Weekly Courier, newspapers of said county, a notice on said 20th day of July, 1869, and daily thereafter till the 25th day of August, in these words:

"To the qualified voters of Tippecanoe county, Indiana.

"Pursuant to an order of the board of commissioners of said county, notice is hereby given that the several voting places and precincts in said county will be open on Saturday, the 28th day of August, 1869, for the purpose of taking the votes of the legal voters of said county for or against the appropriation of three hundred and seventy-three thousand dollars, to be taken as stock in the Lafayette, Muncie, and Bloomington Railroad Company, to aid said railroad company in the construction of a railroad through said county.

"A. J. CASTATER,

"Auditor of Tippecanoe county."

In compliance with the law, the sheriff of said county posted handbills in three public places in each of the townships of said county, the last being posted on the 31st of July, 1869, which were copies of the notices published in the Courier by the auditor and above set out.

There was no other notice given to the voters of the county except that published in the Courier and by handbills posted by the sheriff.

The complaint avers, that on the 11th day of December, 1868, the board of commissioners made and entered upon their record an order in relation to districting the several townships of said county for voting purposes and fixing places for voting, as follows:

"They order that the township of Fairfield be districted

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as follows, viz.: All that portion of said township lying north of the half section line running east and west through the center of sections 20, 21, 22, 23, and 24 in said township, shall constitute registering and voting district number two, and the board designate a voting precinct in said district *at or near* the corner of Sixth and Salem streets, in the city of Lafayette, in said township. And the board further order that all that portion of said township lying south of said half section line (Union street) and east of the section line running north and south between sections number 20, 29, and 32 on the west and sections 21, 28, and 33 on the east of said township upon which section line Ninth street in said city is located, shall constitute registering and voting district number three, and the board designate a place of voting for said district *at or near* the corner of Main and Ninth streets in said city. And the board further order that the balance of said township not embraced in said districts shall constitute registering and voting district number one, with a voting precinct at the recorder's office in said district." The board then appointed a board of registry and an inspector.

It is averred that this order continued in force till August 26th, 1869, when the board of commissioners, at a special meeting, set aside the same and passed the following:

"Ordered, by the board, that the order passed by this board on the 11th day of December, 1868, and recorded * * in relation to districting the several townships for voting purposes be and the same and every part thereof is hereby vacated, repealed, and set aside; and the board further order that there be established four election precincts or voting places in Fairfield township, to be numbered one, two, three, and four, for holding elections, which voting places shall be as follows: Precinct, or voting place, number one, at the county recorder's office, in the city of Lafayette; precinct, or voting place, number two, at the county auditor's office, in said city; precinct, or voting place, number three, at the west wing of the office of the clerk of the circuit court, in said city; precinct, or voting place, number four, at the east wing

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of the office of the clerk of the circuit court, in said city; and the board appoint John S. Williams inspector of said precinct, or voting place, number two, Charles Hasty inspector of said precinct, or voting place, number three, and Judson A. Cleveland inspector of said precinct, or voting place, number four."

The complaint alleges, that there was no notice given of this repealing order changing the places of voting in Fairfield township; that on the 28th day of August, 1869, the polls were opened pursuant to the notice given, and "a vote of a portion of the voters of said county, *being all the legal voters who offered to vote* at the voting places where the polls were opened, was taken upon the question of said railroad appropriation, which vote in the township of Fairfield, in said county, was taken at the following named places, and not elsewhere, in the city of Lafayette," to wit: at the places named in the repealing order of August 26th above copied, in the recorder's, auditor's, and clerk's offices. It is charged that more than half of the votes cast upon the question of the appropriation were cast in Fairfield township, at said offices, which were in buildings not over forty yards apart.

The complaint proceeds to allege that on the Thursday next succeeding the day of the voting, all those composing the board of canvassers under said act, "except the inspectors of two voting places, to wit, one in Wabash and one in Washington township, in said county, at which places polls were opened and votes were cast, to whom the judges' certificates, poll-books and tally sheets of said precincts had been delivered, met at the proper time and place and canvassed the vote of said county, except in this, that the certificates, poll-books and tally sheets of the two voting places above mentioned were not present, nor were the inspectors present who had the same in charge; and on said day, at said time and place, those of said board present as aforesaid prepared and signed a statement of the number of votes cast on said day for and against said appropriation, except as to the two precincts last mentioned."

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The certificate of the board of canvassers shows their meeting and canvassing of the votes and their examination and comparison of the returns, &c., and they certify that the whole number of votes cast was 5,657:

For the appropriation,	-	-	-	-	-	3,253
Against the same,	-	-	-	-	-	2,404
Thus showing a majority in favor of	-	-	-	-	-	849

This certificate was signed by seventeen out of nineteen inspectors, and attested by the auditor of the county as chairman.

The complaint admits "that the vote of said two omitted precincts, if the same had been counted, would still have left a majority of the votes cast in said county, of between five and six hundred, in favor of the railroad appropriation."

At the regular June session of the board of commissioners for 1870, the complaint avers, two orders were made, one on the 8th of June in these words:

"Whereas a petition was presented to this board at a special session duly convened on the 20th day of July, 1869, signed by William S. Lingle and sundry others, making in all over one hundred freeholders of Tippecanoe county, Indiana, asking said board to make an appropriation of three hundred and seventy-three thousand dollars to aid the Lafayette, Muncie, and Bloomington Railroad Company in the construction of its railroad through said county, which petition was duly entered of record, and this board then ordered the several polls at the several voting places in said county to be opened on the 28th day of August, 1869, and the votes of the legal voters of said county to be taken upon the subject of said appropriation of money to aid said company in the construction of said railroad; and whereas it appears from the official certificates of the auditor and sheriff of said county that notice of the opening of said polls on said 28th day of August, 1869, for the purpose aforesaid, was duly published and given as required by law, and it further appears from the written statement of the board of canvassers of said county, that the said polls were opened pursuant to

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said order of this board and of notice so given as aforesaid, at the several voting places in said county, on the said 28th day of August, 1869, and the votes of the legal voters of said county taken, and that a majority of the votes cast on said day, pursuant to said order and notice upon said subject, was in favor of said railroad appropriation, all of which appears on the records of this board as required by law :

“Now, therefore, in pursuance of the statute in such case made and provided, the Board of Commissioners of the County of Tippecanoe hereby grant the prayer of said petitioners contained in the petition so presented on the 20th day of July, 1869; and because the whole amount named in said petition exceeds one per centum upon the amount of the taxable property on the tax duplicate of said county for the year 1870, the board now hereby levy a tax of one half the amount of said appropriation so asked for as aforesaid, to wit, the sum of one hundred and eighty-six thousand five hundred dollars, upon the real and personal property in said county of Tippecanoe, to be collected *pro rata* upon the same; and the auditor of said county is hereby directed to assess and apportion the same against and upon the tax duplicate as required by law.”

The other order was made on the 14th of June, in these words :

“Ordered by the board, that there be levied for county purposes for the year 1870, twenty cents on each one hundred dollars of valuation of taxable property, and one dollar on each poll, to be assessed, levied, and collected according to law, and a special tax of ninety cents on each one hundred dollars valuation of taxable property, to aid in the construction of the Lafayette, Muncie, and Bloomington Railroad through Tippecanoe county, said tax to be used in taking stock in said railroad company in the name of said county when said tax is collected.”

The complaint avers that the railroad company, defendant, procured the petition of the freeholders to be filed, and the

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passage of all the orders of the commissioners, and that said company had filed petitions with the board for the purpose of having aid afforded to build its road by having stock taken, &c.

The complaint alleges, that the defendant Castater, as auditor of the county, was about to proceed, in obedience to the above quoted orders of the commissioners, to apportion the special tax to be levied for the railroad appropriation upon the property in said county, and would do it unless restrained; that he would apportion and impose a part of the same, to wit, seventy-five dollars, upon Geiger's property, and put it on the tax duplicate for the purpose of collecting the same through the treasurer of the county; that said tax would, if put on the duplicate, be a cloud and incumbrance upon his property, &c.

The complaint alleges, that said tax is wrongful and oppressive, and ought not to be collected, for the following reasons:

1. That said act is unconstitutional and void.
2. That the proceedings of the commissioners in ordering the vote and levying the tax were unauthorized and void.
3. That the petition of the freeholders and the proceedings of the commissioners in reference thereto and of those acting under them are defective and irregular, in this, to wit:
 - (a) Because the prayer of the petition was in the alternative (i. e. for a donation or for taking stock), which it was impossible to grant in the terms asked.
 - (b) Because if the petition was correct, the proposition should have been submitted to the voters in the alternative, so as to leave the commissioners free afterwards to determine the mode of appropriation.
 - (c) Because the inspectors of two voting precincts were not present and did not participate in the proceedings of the board of canvassers, nor were the votes cast at those precincts canvassed by the board.
 - (d) Because the simple question submitted to the voters.

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was whether the board should take stock in the railroad company.

(e) Because the commissioners, instead of taking the petition under advisement, determined, prior to the taking of the vote, that they would take stock in the company.

(f) Because, instead of taking the petition under advisement, the commissioners determined to take stock, and then merely submitted to the voters the question of whether they would or would not ratify their action.

(g) Because the notices required by statute were not given, but that the notices merely submitted the question of taking stock.

(h) Because of the changing of the voting places in Fairfield township, no valid notices were given of the time and places at which the polls would be opened in the county (and especially in that township) for the reception of votes upon the question of the railroad appropriation.

(i) Because the vote of Fairfield township was cast at the places designated by the commissioners in their order of August 26th, 1869, of which no notice was given, instead of at the usual places theretofore established.

Prayer for an injunction restraining the auditor from assessing said railroad tax, or any part of it, upon the tax duplicate, against the appellee's property, &c.

A general demurrer to the complaint was filed by the defendants, which was overruled, and exception was taken.

The defendants refusing to answer further, the court entered a perpetual injunction against the levying or collecting of the tax, in accordance with the prayer of the complaint, to which the defendants excepted.

Two errors only are assigned: first, that the court erred in overruling the demurrer to the complaint; second, that the court erred in granting the injunction.

The first section of the act under consideration reads as follows:

“SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever a petition shall be presented

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to the board of commissioners of any county in this State, at any regular or special session thereof, signed by one hundred or more freeholders of said county, asking said board to make an appropriation of money to aid a railroad company, named in such petition, then duly organized under the laws of this State, in the construction of a railroad in or through such county, or whenever such a petition shall be presented to such board of commissioners as aforesaid, signed by twenty-five freeholders of any township of such county, asking such township to make an appropriation of money to aid a railroad company named in such petition, and then duly organized as aforesaid, in constructing a railroad in or through such township, by taking stock in, or donating money to, such company, to an amount specified in such petition, not exceeding, however, two per centum upon the amount of the taxable property of such county or township, as the case may be, on the tax duplicate of the county, delivered to the treasurer of the county for the preceding year, it shall be the duty of the board of commissioners, after being satisfied that such petition has been properly signed by the requisite number of freeholders of such county or township, as aforesaid, to cause the same to be entered at full length upon their records."

Section 12 of said act reads thus: "If a majority of the votes cast shall be in favor of such railroad appropriation, the board of county commissioners, at their ensuing regular June session, shall grant the prayer of said petition, and shall levy a special tax of at least one-half the amount specified in said petition, but not exceeding one per centum upon the real and personal property in the county or township, as the case may be, liable to taxation for state and county purposes, which tax shall be collected in all respects as other taxes are collected for state and county purposes; and if the sum so levied shall not be equal to the amount specified in said petition, then the residue thereof shall be levied by said board of county commissioners at the June session of the following year."

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Before we consider the question of whether the act under consideration is in conflict with the constitution, it is important for us to ascertain the rules of interpretation and construction by which we are to be guided and controlled. This can be best done by a brief reference to our system of government. Section 1 of article 5 of the constitution declares, that "the legislative authority of the State shall be vested in the General Assembly."

The Supreme Court of Iowa, in a recent decision, (*Stewart v. Board of Supervisors of Polk County*, 30 Iowa, 9) in commenting upon a provision similar to the one above quoted, say: "The people, then, have vested *the* legislative authority *inherent in them* in the General Assembly. The people were the original possessors of *all* the legislative authority in the state. By this section they vest it *all* in the General Assembly. Subsequently, in the same instrument, they withdraw some portions of this authority, and impose certain restrictions upon the exercise of the authority granted. It follows, therefore, as a logical sequence, that, within these limitations and restrictions, the legislative power of the General Assembly is supreme; that it is bounded only by the limitations written in the constitution. WRIGHT, J., in *Morrison v. Springer*, 15 Iowa, 304, says, 'The legislature clearly has the power to legislate on all rightful subjects of legislation, unless expressly prohibited from so doing, or where the prohibition is implied from some express provision. *This theory must never be lost sight of by the courts in examining the powers of the legislature. It is elementary, cardinal, and frequently possesses controlling weight in determining the constitutional validity of their enactments. The General Assembly possesses all legislative authority not delegated to the General Government, or prohibited by the constitution.*'"

The third article of our constitution provides, that "the powers of the government are divided into three separate departments: the legislative, the executive, including the administrative, and the judicial; and no person, charged with official duties under one of these departments, shall

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exercise any of the functions of another, except as in this constitution expressly provided."

The same division of powers exists in the federal constitution, and in most, if not all, of the state constitutions, and is essential to the maintenance of a republican form of government. These departments of government are equal, co-ordinate, and independent. The duties imposed on each are separable and distinct, and it is expressly provided, that "no person, charged with official duties under one of these departments, shall exercise any of the functions of another." The persons charged with the execution of these powers are alike elected by, and responsible to, the people, in whom resides the sovereignty of the state. This division of power prevents the concentration of power in the hands of one person or one class of persons.

Upon the legislative department is conferred the power of making laws; upon the judicial department is imposed the duty of construing and interpreting the constitution and laws, and of making decrees determining private controversies; and upon the executive department is imposed the duty of executing the laws as made by the legislative department and construed by the judicial department. There is a wide and marked difference between the legislative power possessed by Congress and the legislature of a state, and in the rules and canons of construction in determining whether an act of Congress or of a state legislature is in conflict with the constitution. The federal government is one of limited and delegated powers, and Congress can exercise no power unless it has been expressly delegated, or shall be necessary and proper for carrying into execution the enumerated powers; and when the power of Congress to enact a law is called in question, it must be shown that the power to enact the law in question has been conferred in the manner above stated. MARSHALL, C. J., in speaking for the Supreme Court of the United States, in the case of *M'Culloch v. State of Maryland*, 4 Wheat. 316, says, "This government is acknowledged by all to be one of enumerated powers. The principle, that

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it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

The true line of distinction between the powers of the federal and state governments was drawn with great clearness and force by WASHINGTON, J., in the case of *Golden v. Prince*, 3 Wash. C. C. 313. This great and learned judge said, "The powers bestowed by the constitution upon the government of the United States were limited in their extent, and were not intended, nor can they be construed to interfere with other powers, before vested in the state government; which were, of course, reserved to those governments impliedly, as well as by an express provision of the constitution. The state governments, therefore, retained the right to make such laws as they might think proper, within the ordinary functions of legislation, if not inconsistent with the powers vested exclusively in the government of the United States, and not forbidden by some article of the constitution of the United States, or of the state; and such laws were obligatory upon all the citizens of that state, as well as others who might claim rights or redress for injuries, under these laws, or in the courts of that state."

When the constitution of a state vests in the General Assembly all legislative power, it is to be construed as a general grant of power, and as authorizing such legislature to pass any law within the ordinary functions of legislation, if not delegated to the federal government or prohibited by the state constitution.

DEWEY, J., in speaking for the court, in the case of *Beauchamp v. The State*, 6 Blackf. 299, with his usual clearness and ability, draws the line of distinction between the powers of the federal and state governments. He says, "This is not a grant of special, limited, and enumerated powers, implying a negative of all others, as is the case with the constitution of the United States. The legislative authority of this State

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is the right to *exercise supreme and sovereign power, subject to no restrictions except those imposed by our own constitution*, by the federal constitution, and by the laws and treaties made under it. This is the power under which the legislature passes all laws."

PERKINS, J., in *Doe v. Douglass*, 8 Blackf. 10, says, "If, then, this act is unconstitutional, it is because it infringes some restrictions upon the legislative power of the state, for that power is supreme except wherein restrictions have been imposed."

In the case of *Vanhorn's Lessee v. Dorrance*, 2 Dall. 304, the true nature of our government is stated with great clearness, force, and accuracy. The court say, "In England, the authority of parliament is transcendent and has no bounds. It has sovereign and uncontrollable authority; being the place where the absolute, despotic power, which must in all governments reside somewhere, is entrusted by the constitution of the kingdom. Its authority runs without limits, and rises above control, and the validity of an act of parliament cannot be drawn in question by the judicial department. But in America the case is different. Every state in the Union has its constitution reduced to writing. This constitution is the form of government, delineated by the people, in which the first principles of fundamental laws are established. It is certain and fixed, and is the supreme law of the land. It is paramount to the power of the legislature; the legislature is the creature of the constitution. The powers of the legislature are derived from the constitution, and their acts must be conformable to it. Every act of the legislature repugnant to the constitution is absolutely void."

The principles by which a court should be governed in holding a law to be unconstitutional are stated with very great clearness and completeness by MARSHALL, C. J., in the case of *Fletcher v. Peck*, 6 Cranch, 87, and by FRAZER, J., in the case of *Brown v. Busan*, 24 Ind. 194.

MARSHALL, C. J., says, "The question, whether a law be void for its repugnancy to the constitution, is at all times, a

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question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

FRAZER, J., says; "The constitution is paramount to any statute, and whenever the two are in conflict, the latter must be held void. But where it is not clear that such conflict exists, the court must not undertake to annul the statute. This rule is well settled, and is founded in unquestionable wisdom. The apprehension sometimes, though rarely, expressed, that this rule is vicious, and constantly tends toward the destruction of popular liberty by gradually destroying the constitutional limitations of legislative power, results from a failure to comprehend the character of our forms of government, and the fundamental basis upon which they rest. The legislature is peculiarly under the control of the popular will. It is liable to be changed, at short intervals, by elections. Its errors can, therefore, be quickly cured. The courts are more remote from the reach of the people. If we, by following our doubts, in the absence of clear convictions, shall abridge the just authority of the legislature, there is no remedy for six years. Thus, to whatever extent this court might err, in denying the rightful authority of the law-making department, we would chain that authority, for a long period, at our feet. It is better and safer, therefore, that the judiciary, if err it must, should not err in that direction. If either department of the government may slightly overstep the limits of its constitutional powers, it should be that one whose official life shall soonest end. It has the least motive to usurp power not given, and the people can

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sooner relieve themselves of its mistakes. Herein is sufficient reason that the courts should never strike down a statute, unless its conflict with the constitution is clear. Then, too, the judiciary ought to accord to the legislature as much purity of purpose as it would claim for itself; as honest a desire to obey the constitution, and also a high capacity to judge of its meaning. Hence, its action is entitled to a respect which should beget caution in attempting to set it aside. This, with that corresponding caution of the legislature, in the exercise of doubtful powers, which the oath of office naturally excites in conscientious men, would render the judicial sentence of nullity upon legislative action as rare a thing as it ought to be, and secure the harmonious co-operation of the two departments and that independence of both which are essential to good government."

BLACKFORD, J., in the case of *The State v. Cooper*, 5 Blackf. 258, in speaking of the constitutionality of an act of 1831, says, "In questions of this kind, it is our duty to decide in favor of the validity of the statute, unless its unconstitutionality is so obvious as to admit of no doubt."

DEWEY, J., in the case of *Beauchamp v. The State*, 6 Blackf. 299, in speaking of the constitutionality of a law, says, "If it be unconstitutional, all such proceedings are void. The consequences are evident. Before we can consent to open a door to them, we must have the *fullest conviction that stern duty demands it at our hands*. We have not that conviction. We are not satisfied that the general authority of the legislature is so trammelled by any portion of the constitution, as to be incompetent to pass this beneficial law. We had this subject under consideration on a former occasion, and after much reflection, came to the same conclusion which we now express. If the views here advanced do not leave the constitutional question in regard to this law free from all difficulty, we feel well assured they involve it in too much doubt to authorize us to declare the statute a nullity."

In the case of *Maize v. The State*, 4 Ind. 342, STUART, J., speaking for the court, says: "Such questions are always

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regarded by the courts as of serious importance. The judiciary look to the acts of the legislature with great respect, and reconcile and sustain them if possible. The general assembly is the immediate exponent of the popular will, expressly delegated to clothe that will with the forms of law. The presumption that such a body has sanctioned enactments in violation of the constitution, is not to be lightly indulged. That the act is imperfect or impolitic is not enough. These defects subsequent legislation can remove by amendment or repeal. To bring its validity within the control of the courts, it must be clearly subversive of the constitution."

BLACK, C. J., in *Sharpeless v. The Mayor of Philadelphia*, 21 Penn. St. 147, says, "There is another rule which must govern us in a case like this, namely, that we can declare an act of assembly void, only when it violates the constitution *clearly, palpably, plainly*, and in such a manner as to leave no doubt or hesitation in our minds."

We recognize as correct the doctrine so repeatedly enunciated by the highest courts and ablest lawyers, that constitutions are to receive a strict construction, and that acts of the legislature are to be liberally construed.

As we will be required in the decision of this case to place a construction upon, and give an interpretation to, several sections of our constitution, it is important and essential that we should ascertain the rules of *constitutional construction*. The Supreme Court of the United States have enunciated several rules of constitutional construction, among which the following are important:

1st. The framers of the constitution must be understood to have employed words in their natural sense, and to have intended what they said; and, in construing the extent of the powers which it creates, there is no other rule than to consider the language of the instrument which confers them in connection with the purposes for which they were conferred. The court should look to the nature and objects of the particular powers, duties, and rights in question, with all

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the lights and aids of cotemporary history, and give to the words of each provision just such operation and force, consistent with their legitimate meaning, as will fairly secure and attain the end proposed. *Gibbons v. Ogden*, 9 Wheat. 1; *Prigg v. Pennsylvania*, 16 Pet. 539.

2d. The court should look to the history of the times, and examine the state of things existing when the constitution was framed and adopted, to ascertain the old law, the mischief, and the remedy. Thus, the language used in the federal constitution as to the power of pardoning must be construed by the exercise of that power in England prior to the revolution, and in the states prior to the adoption of the constitution. *Rhode Island v. Massachusetts*, 12 Pet. 657; *Ex parte Wells*, 18 How. U. S. 307.

3d. A cotemporary exposition of the constitution, practiced and acquiesced in for a period of years, fixes the construction; and the court will not shake or control it. *Stuart v. Laird*, 1 Cranch, 299; *M'Culloch v. Maryland*, 4 Wheat. 316; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Prigg v. Pennsylvania*, 16 Pet. 539; *N. Y. Steam Navigation Co. v. Merchants Bank*, 6 How. 344; *West River Bridge Co. v. Dix*, *id.* 507; *Cooley v. Wardens of the Port of Philadelphia*, 12 How. 299; *The Genesee Chief v. Fitzhugh*, *id.* 443.

4th. Where a statute admits of two interpretations, one of which brings it within, and the other presses it beyond, the constitutional authority of the legislative department, the judiciary will adopt the former construction; because a presumption ought never to be indulged that the legislature meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous. *United States v. Coombs*, 12 Pet. 72.

Having laid down the rules by which we are to be governed in construing the constitution and the law in question, we proceed to consider the real questions involved in this case. The first and principal objection urged against the validity of the action of the board of commissioners is,

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that the act of the legislature authorizing aid by counties and townships to the construction of railroads is unconstitutional and void, for the reason that the legislature does not possess the constitutional power to tax the people for such a purpose. We approach the discussion of this grave and important question, deeply impressed with the weight of responsibility imposed upon us and the magnitude of the interests involved in our decision. We have given the subject our best and most careful consideration. We have been greatly aided in our labors by the very thorough and able briefs filed in this cause, and by the very accurate, comprehensive, and exhaustive oral argument submitted to us by the able and learned counsel engaged in the case. The constitutional power of the state legislatures to impose a tax upon the people to aid in the construction of railroads, canals, and other works of improvement has been undergoing the most thorough and elaborate discussion in many of the states. The question has been passed upon by the courts of twenty-four states. The most of these decisions have been based upon the general power of taxation possessed by the legislative department of the government. In some of the states it was held that there was an express delegation of power in the constitution. We propose to base our decision upon the provisions of our own constitution, and the adjudications of this court, with such aid as we can derive from decisions in other states in construing our constitution. It has been earnestly insisted by the appellants that section six of article ten of our State constitution contains a grant of power; while the appellee has contended that that section was intended as a restriction and limitation upon the general grant of power. The decision of this question will be decisive of the principal point involved in the case. Section six of article ten reads as follows :

“Sec. 6. *No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose*

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of taking stock in any such company; nor shall the General Assembly ever, on behalf of the State, assume the debts of any county, city, town, or township, nor of any corporation whatever."

The second rule laid down by the Supreme Court of the United States, in construing a constitution, reads thus:

"The court should look to the history of the times and examine the state of things existing when the constitution was framed and adopted, to ascertain the old law, the mischief, and the remedy."

In 1836, the State of Indiana engaged in a general system of internal improvements. The State issued her bonds for millions of dollars, which were sold in the market at a heavy discount. The money thus procured was squandered on various railroads and canals, without completing any of them. The State was unable to pay either the interest or principal of her bonded debt. The bonds of the State greatly depreciated in value, and her credit was utterly ruined in the money market. This wasteful, reckless, and extravagant expenditure of money continued until 1842, when the whole system broke down, and the completion of the works commenced was abandoned by the State. On the 28th day of January, 1842, the legislature passed an act, entitled "an act to provide for the continuance of the construction of all or any part of the public works of this State, by private companies, and for abolishing the board of internal improvements and the offices of fund commissioners and chief engineer." The sixty-first section of said act reads as follows:

"It shall be lawful for any county within this State to take stock in such association; and for this purpose, the several boards doing county business are hereby empowered to subscribe therefor, and to levy a tax as for county purposes, not exceeding one dollar on every hundred dollars of assessed property, to be applied to such object; and the county shall hold such stock as individual stock is held in such association."

Under this act many private companies were formed. A

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large number of the counties took stock in such associations, and issued bonds instead of levying taxes, and became thereby largely indebted.

On the 14th of February, 1848, the legislature passed an act incorporating the Ohio and Mississippi Railroad Company, the twelfth section of which reads as follows :

“It shall be lawful for the county commissioners of any county in the State of Indiana through which said railroad passes, for and on behalf of such county, to authorize, by order on their records, so much of said stock to be taken in said railroad as they may deem proper at any time within five years after opening the books of subscription to said stock: provided, however, that it shall be and is hereby made the duty of said county commissioners in any county through which said railroad may pass, in the State of Indiana, to subscribe for stock for and on behalf of said county, if a majority of the qualified voters of said county, at any annual election within five years after said books are opened, shall vote for the same by placing on their tickets, subscription to railroad stock.”

Under this act, the most of the counties through which the said railroad passed, in the State of Indiana, made subscriptions of stock in said company, and issued their bonds to secure the payment thereof. Charters were granted to several other companies with similar provisions. Under the State system the State had become bankrupt, and under the county system many of the counties had created heavy and onerous debts. In 1846 and 1847, the State effected a compromise with her bond holders, by surrendering to them the Wabash and Erie canal for one half the debts, and issuing new bonds for the other half. Such was the condition of our State when the constitutional convention assembled in 1850; and in placing a construction upon the provisions of our present constitution, we are required to take into consideration the provisions of the old constitution, existing laws, the mischiefs resulting therefrom, and the remedy proposed in the new constitution.

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Section five of article ten was adopted to prevent the State from again engaging in a system of internal improvements on credit. That section reads as follows:

"Sec. 5. No law shall authorize any debt to be contracted, on behalf of the State, except in the following cases: to meet casual deficits in the revenue; to pay the interest on the State debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, to provide for the public defense."

This section does not prohibit the State from building railroads or canals, but it does provide that no debt shall be contracted for that purpose. The legislature undoubtedly possesses the power, under the general grant of powers, to engage in the construction of works of public use, provided she has the money and pays for the work as it progresses. The only limitation or restriction on the power of the general assembly is, that no debt shall ever be contracted on behalf of the State for such object. Sections five and six of article ten engaged the earnest and serious attention of the convention. The discussion of the matters embraced therein consumed six entire days, and was conducted with great earnestness and marked ability. The debates in the convention on the matters embraced in sections five and six show that nearly every speaker referred to the financial condition of the State, counties, cities, and the people, produced by the attempt to construct railroads and canals on credit; nearly every speaker expressed himself in favor of the construction of such works, but declared that the past experience had demonstrated that it was neither wise, safe, nor politic to permit either the State or counties to create any debt for such purpose. There was great diversity of sentiment in the convention. Some of the members advocated absolute prohibition; a few opposed any restriction; but the great majority were in favor of retaining the power, and desired to place such restrictions and limitations upon the exercise of the power as would prevent in the future the evils that resulted from the credit system. The result was the adoption of sections five and six, which, by plain implication, admit that by

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the general grant of legislative power, the power was delegated to the General Assembly, and these sections were intended to restrict and limit the power conferred, in such a manner as to prevent the creation of any debt by the State or counties for such purpose.

Let us analyze section six, and see what it contains. It contains four propositions; first, no county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; second, no county shall loan its credit to any incorporated company; third, no county shall borrow money for the purpose of taking stock in any such company; fourth, that the General Assembly shall never, on behalf of the State, assume the debts of any county, city, town, or township, or of any corporation whatever. These propositions are plainly stated, and seem to be easily understood, except the clause prohibiting a county from loaning its credit to any incorporated company. The meaning of this clause is rendered plain by reference to the practice that prevailed under the act of 1842. Quite a number of the counties had guaranteed the payment of bonds issued by the private associations that had been organized under the act of 1842. The object of the inhibition in question was to prohibit and render impossible this practice. These propositions are all stated negatively. They were intended as limitations upon the general powers granted by section 1 of article 5, and necessarily assumed the negative form. Let us transpose the first clause, and state it affirmatively. Thus transposed, it would read, "Any county may subscribe for stock in any incorporated company, if such stock is paid for at the time of such subscription." This is the plain and undoubted meaning of this clause. If the purpose had been to absolutely prohibit a county from subscribing for stock, the object would have been effectually accomplished by omitting the condition. The section would then have read, "No county shall subscribe for stock in any incorporated company." Such language would have been plain and unambiguous, and there would have been no room for doubt. The

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prohibition would have been absolute. It will not do to say that this clause was intended as a prohibition. It was a limitation upon an existing right. It is manifest that the framers of the constitution supposed that the power to subscribe for stock had been previously granted, for it would be absurd to suppose that they would either attempt to *prohibit* or *limit* a power that did not exist. If this clause is treated as a prohibition, it unavoidably results that the same construction must be placed on section five, which would deprive the General Assembly of the power to construct a railroad or canal, although she had the money to pay, and contracted no debt therefor. Nor would the evils of such a construction stop here. Section twenty-one of article one reads as follows: "No man's particular services shall be demanded without just compensation. No man's property shall be taken by law without just compensation; nor except in case of the state, without such compensation first assessed and tendered." If the construction contended for were applied to the sentence, that "no man's property shall be taken by law without just compensation," it would deprive the General Assembly of the power to grant the right of eminent domain to any incorporated company. If this sentence were transposed, and stated in an affirmative manner, it would read, "Any man's property may be taken by law, for a public use, provided just compensation is made therefor; and if such property is taken by any person other than the state, the compensation shall be assessed and tendered before it can be taken." The evident purpose was to recognize the existence of the right of eminent domain; and to impose a restriction upon the exercise of such right, so as to prevent a corporation from taking private property until just compensation had been assessed and tendered.

The sixth section provides, that "no county shall subscribe for stock in any *incorporated company*," &c. This language is general. It does not define the character or purposes of the company. It, therefore, becomes necessary to ascertain, if possible, the character and purposes of the company in-

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tended by the framers of the constitution. Mr. Justice MARTIN, in delivering the opinion of the Supreme Court of Michigan, in the case of *Swan v. Williams*, 2 Mich. 427, gives a very clear and comprehensive definition of the different classes of corporations. He says, "Most certain it is that as to all their rights, powers and responsibilities, *three* grand classes of corporations exist: first, political, or municipal corporations, such as counties, towns, cities and villages, which, from their nature, are subject to the unlimited control of the legislature; second, those associations which are created for *public benefit*, and to which the government delegates a portion of its sovereign power, to be exercised for public utility, such as turnpike, bridge, canal and railroad companies; and, third, *strictly private corporations*, where the *private interest* of corporators is the *primary* object of the association, such as banking, insurance, manufacturing, and trading companies."

It is quite clear to us that the framers of the constitution, in using the phrase "incorporated company," referred to the second grand class of incorporations as above defined. This is manifest from several considerations. The power was being conferred upon counties, which are included in the first grand class. It certainly was not the intention to authorize counties to subscribe for stock in townships, cities, or towns. It is equally plain that it was not intended that counties should subscribe for stock in strictly private corporations, such as banking, insurance, manufacturing, or trading companies. It was broadly admitted in argument, and is well settled on principle, and by a long and unbroken line of decisions, that the power of taxation cannot be exercised for private purposes; it must be for a public use. The meaning and intention of the framers of the constitution are rendered quite plain and obvious, when we "look to the history of the times, and examine the state of things existing when the constitution was framed and adopted." The policy of the State had been to encourage counties to take stock in canal and railroad companies. Laws then in existence authorized such subscriptions. Besides, the debates in the convention

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to them, and they, with full knowledge that it is intended to subscribe for stock, impose the tax on themselves, they will have no cause of complaint against any person but themselves.

Having arrived at the conclusion that section six of article ten recognizes the existence of the constitutional power in the legislature to authorize municipal corporations to subscribe for stock in railroad companies, subject to the limitations prescribed, we are next required to determine whether this power carries with it, by necessary implication, the power to adopt such means as may be adequate to accomplish the end proposed.

MARSHALL, C. J., in delivering the unanimous decision of the court, in the case of *M' Culloch v. Maryland*, 4 Wheat. 316, says, "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think that the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

In the case of *Thayer v. Hedges*, 23 Ind. 141, this court adopts the rule of construction laid down by MARSHALL, C. J. FRAZER, J., in speaking for the court, says, "To do so, it may resort to any measure which is appropriate, which plainly conduces to that end, and which is not prohibited, and is not inconsistent with the letter or spirit of the constitution."

In support of this rule of construction, we refer to the following authorities: *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *Bank of the U. S. v. Norton*, 3 A. K. Marsh. 422; *Braynard v. Marshall*, 8 Pick. 194; *Hempstead v. Reed*, 6 Conn. 480; *Commonwealth v. Lewis*, 6 Biran.

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266; *Eubank v. Poston*, 5 T. B. Monr. 286; *U. S. v. Fisher*, 2 Cranch, 358; *M' Culloch v. Maryland*, 4 Wheat. 316; *Woodson v. Randolph*, 1 Va. Cas. 128; *Magill v. Parsons*, 4 Conn. 317; *Commonwealth v. Morrison*, 2 A. K. Marsh. 75; *Osborn v. U. S. Bank*, 9 Wheat. 738; *Wayman v. Southard*, 10 Wheat. 1.

It is conceded that section one of article five and section six of article ten, combined, confer on the General Assembly the power to authorize, by appropriate legislation, municipal corporations to subscribe for stock in railroad companies, on the express condition that the money is paid at the time of such subscription; that counties cannot loan their credit or borrow money for such purpose; that the counties have no means of obtaining money except by taxing the people; and that it would be a fraud upon the tax-payers to obtain the money by indirect, unfair, and illegal modes. Does it not necessarily and unavoidably result from these premises, that the only fair and legitimate mode of obtaining the money for such purpose, is to submit the question to the people; and that the means adopted in the case under consideration were appropriate, plainly conduced to the end, were not prohibited, and are not inconsistent with the letter and spirit of the constitution?

We have heretofore shown that it is a rule of construction that a cotemporary exposition of the constitution, practiced and acquiesced in for a period of years, fixes the construction; and that the court will not shake or control it. We have shown what was the policy of the State, as declared in her legislative acts. We now proceed to show what exposition has been given of the old constitution and the laws passed under it, authorizing counties to take stock in railroad companies, and of the new constitution.

The question was submitted to the voters of Knox county, under the twelfth section of the special charter of the Ohio and Mississippi Railroad Company, whether they were in favor of the county subscribing for stock in such company. The vote was in favor of such subscription. The bonds of the county were issued prior to the adoption of the present

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constitution. The county afterwards refused to pay the interest upon such bonds. William H. Aspinwall and others, who were the owners of some of the bonds issued by said county, commenced an action in the circuit court of the United States against the commissioners of said county, to recover the amount of interest due on such bonds. The plaintiffs recovered a judgment in the circuit court, and the defendants appealed to the Supreme Court of the United States, where the judgment was affirmed. The Supreme Court held the law under which such subscription was made to be valid, and that the action of the board of commissioners was binding upon the county. See 21 How. 539.

After the rendition of this judgment, the commissioners of said county refused to levy a tax to pay such judgment. The same plaintiffs commenced a proceeding by mandate against the commissioners of said county in the circuit court of the United States, to compel them to levy a tax to raise money to pay said judgment. A peremptory mandate was awarded. The commissioners again appealed to the Supreme Court of the United States, where the judgment below was again affirmed. See 24 How. 376.

The people of Daviess county, by a popular vote under said twelfth section, decided in favor of taking thirty thousand dollars stock in said railroad. The vote was taken on the first Monday of March, 1849. The commissioners of said county, on the 10th of September, 1852, in pursuance of said act and election, subscribed for such stock and issued the bonds of the county. The new constitution took effect on the 1st day of November, 1851. The commissioners of said county refused to pay the interest on such bonds. The holders of the bonds commenced an action in the circuit court of the United States against the commissioners of said county, to recover two instalments of interest on such bonds. The judges of the circuit court divided and certified a division of opinion, and on that the case went to the Supreme Court of the United States. The vote had been taken under the old constitution, and the subscription had been made, and the bonds had

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been issued, after the new constitution took effect. The question was, whether at the time when the new constitution took effect, there was not such a right to the subscription and bonds vested in the railroad company as could be upheld, notwithstanding the constitutional prohibition against a county subscribing for stock in a railroad company, and issuing bonds therefor, instead of paying for the same at the time when such subscription was made.

The Supreme Court held that the vote in favor of the subscription was valid, but that the subscription and bonds were void for the reason that the sixth section of article ten of our constitution prohibited a county from subscribing for stock in a railroad company unless the money was paid at the time the subscription was made.

We regard this decision as entitled to great weight in the case under consideration, for the reason that it furnishes a cotemporary exposition of the section under discussion, and shows that the prohibition in said section was not against a county subscribing for stock, but against issuing the bonds of the county, instead of paying the money as required by said section. The court held that the power conferred by the charter being upon a county, a public corporation, or civil institution of government, did not constitute such a contract as contemplated by the constitution, which prohibits any state from passing any law "impairing the obligation of a contract." See *Aspinwall v. The Commissioners of Daviess Co.* 22 How. 364.

We will next examine the adjudications of this court and see what construction has been placed upon the section under consideration. In *The City of Aurora v. West*, 9 Ind. 74, PERKINS, J., in delivering the unanimous opinion of this court, says, "The internal improvement of a state by means of roads and canals has always been a legitimate subject to call into exercise the legislative power of the state. It has been, and still is, thus in Indiana. Under the old constitution, such improvements could be carried on by means of loans, creating a State debt. Under the new, they cannot be carried on by that particular means by the State, but must be paid for

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by taxes raised as the works progress. This is an express limitation on the exercise of the power by the State inserted in the constitution. The same limitation is imposed upon the exercise of a like power by the counties of the State. Section six of article ten, by implication, *concedes the power to counties to take stock*, at all events by permission of the legislature, in companies chartered to construct works of internal improvement,—under the new constitution, by making cash payment at the time, under the old, as we have seen, without; and it does not impose any limitation upon the power of cities touching the matter, while it shows that the subject of their taking stock in such companies must have been before the constitutional convention. The provisions in the new constitution, then, on the question under consideration, amount to this: They admit the power of the State to construct works of internal improvement, but forbid her, in her State capacity to create a debt for that purpose. *They grant that the power may be conferred upon counties to take stock in companies chartered to construct such works, but require simultaneous payment.*"

This court, in case of *Dronberger v. Reed*, 11 Ind. 420, says, "Can the taking in this case be regarded as having been by the state? Strictly speaking, all private property taken for public use is taken by the state. No other power can take it. It must be taken by the sovereign power in the exercise of the right of eminent domain. The public necessity and convenience have always indicated highways as one of the objects for which the state might take private property. But the state does not always—scarcely ever, indeed—take the property directly herself. She acts through agents. It is, nevertheless, the state that takes by her agents. But after the policy was adopted, of permitting corporations, such as canal, railroad, and turnpike companies, to construct certain highways, or *quasi* highways, at their own expense and for their own profit, instead of the state, and to take private property for that purpose, it sometimes happened that certain of those companies became unable to pay for the property so taken; and

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to obviate this difficulty, to remedy this evil, the clause in the new constitution was framed in the language we have quoted. It was not very happily chosen. It is certainly not very perspicuous, and does not evince a very clear idea of the subject to have existed in the mind of the author of the section. But we know, historically, that it was aimed at the companies and the evil we have stated. This fact should have influence in its construction."

The foregoing cases have been referred to and approved by this court, in *The Evansville, &c., R. R. v. City of Evansville*, 15 Ind. 395; *The Board of Commissioners of Bartholomew Co. v. Bright*, 18 Ind. 93; and *The City of Aurora v. West*, 22 Ind. 88.

This court, in the case of *Thompson v. The City of Peru*, 29 Ind. 305, refers to and fully approves of the opinion and reasoning of PERKINS, J., in *The City of Aurora v. West*, 9 Ind. 74. GREGORY, C. J., in speaking for the entire court, says, "It is insisted that this section is within the prohibition contained in sections five and six of article ten of the constitution. The former section prohibits the State from contracting a debt to aid in the work of internal improvement; and the latter prohibits counties from subscribing for stock in any incorporated company, unless the same be paid for at the time of such subscription."

The section of the constitution under consideration is not self-executing. It requires the affirmative action of the legislature, authorizing the boards of commissioners to subscribe for stock. This doctrine is very fully discussed and decided in *Harney v. The Indianapolis, &c., R. R. Co.*, 32 Ind. 244. FRAZER, C. J., in delivering the unanimous decision of the court, says: "The counties are corporations created for the purpose of convenient local municipal government, and possess only such powers as are conferred upon them by law. They act by a board of commissioners whose authority is defined by statute. One of the powers conferred is, to collect taxes levied upon the people and property within the county. In the disposition of the

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money thus collected into its general treasury, the board has not unlimited discretionary choice as to the objects upon which it shall be expended. It can only be applied to certain specified objects, and the building of railroads is not one of these objects, or necessary to carry into effect any of the purposes for which such corporations were created. The statutes defining the powers, both corporate and judicial, of boards of county commissioners, enumerate the powers given with care; so that there is little room for doubt as to the extent of those powers. If the authority attempted to be exercised in this instance had been conferred, the statute giving it would not have escaped the attention of the learned counsel representing the appellees, whose carefully prepared printed argument so well attests the skill and industry to which the important interests of his clients have been committed. But no such statute is brought to our attention. While it is undoubtedly true, that municipal corporations, in common with all other instrumentalities of government, are established for the public good, it is not true that they are ordinarily left at liberty to exercise an unlimited discretion in accomplishing that object, or that they are possessed of that discretion unless there is an express limitation imposed. The power to collect money by the imposition of taxes is a high sovereign power, and it is not to be assumed that the legislature has delegated that power to municipalities for discretionary purposes where it has named the purposes for which the money must or may be expended. Such enumeration of objects of expenditure would, according to all authority, exclude objects not enumerated or implied. It need not be controverted that the legislature could clothe counties with power to make such donations as was here attempted. That is not the question before us. Has it been done? Unless the statute book shows affirmatively that it has been done expressly or by fair implication, the conclusion is irresistible that the action of the board of Montgomery county was without authority of law, and therefore void. There is no such statute."

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The Supreme Court of the United States, in *Thomson v. Lee County*, 3 Wall. 327, say: "A county or other municipal corporation has no inherent right of legislation, and cannot subscribe for stock in a public improvement, unless authorized to do so by the legislature. Such a corporation acts wholly under a delegated authority, and can exercise no power which is not in express terms or by fair implication conferred upon it. But the legislature of a state, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner, that the object can be attained, either with or without the sanction of the popular vote."

Section six of article ten of our State constitution expressly prohibits a county from borrowing money to pay for stock subscribed for by such county; consequently, so much of the above opinion as declares the right of a county to borrow money will not apply in this State.

The fourteenth section of the act in question provides, that "said board of commissioners may, after the assessment herein provided for or any part thereof shall have been collected, take stock in such railroad company from time to time, in the name of the proper county or township, as the case may be, and pay therefor when the same is taken, out of the money so collected as aforesaid," &c. Now it is plain from the above quoted provision that this act was not intended to bind a county for a dollar until the money shall be in the treasury from the special tax levied to pay for the stock, and no subscription is authorized to be made until that time. This complies with the plain and undoubted requirements of our constitution. When the money is in the treasury, there is no limitation or restriction contained in the sixth section.

We therefore hold that the General Assembly possessed the power under the constitution to authorize counties to subscribe for stock in a railroad company, on the express condition that the stock is paid for in money at the time

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when the subscription is made; and that the means provided in the said act to raise the money with which to pay for said stock were appropriate, plainly conduced to the end proposed, were not prohibited by the constitution, and were not inconsistent with the letter or spirit of the constitution.

The case under consideration involves the right of a county to make subscriptions to a railroad. We only decide the real question involved in the case. There are other causes pending in this court involving the right of counties to make donations to railroad companies, and of townships to subscribe for stock and to make donations to railroad companies. As to these cases, we withhold the expression of any opinion.

- It is next insisted by the appellees that the act in question violates the twenty-fifth section of article one of our State constitution. This section reads as follows: "No law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution."

It is claimed on the authority of the above section, first, that the act in question is no *law*; that it is not an expression of the legislative will *as law*, but only a proposition to make law; second, that if it be law and an expression of the legislative will, still its taking effect is made to depend, not on the will of the legislature, but on the will of the people.

The point relied upon is, that the vote of the people gives vitality and validity to the act; in other words, that it does not become a law until it has been ratified by a vote of the people. The precise question was raised in the case of *The C. W. & Z. Railroad v. Commissioners of Clinton County*, 1 Ohio St. 77. The question is discussed with great clearness, force, and ability by RANNEY, J., and as we fully concur in the views expressed by him, we will quote from his opinion. That able and learned judge, speaking for the court, says: "That the General Assembly cannot surrender any portion of the legislative authority with which it is invested, or authorize its exercise by any other person or body, is a proposition too clear for argument, and is denied by no one.

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This inability arises no less from the general principle applicable to every delegated power requiring knowledge, discretion, and rectitude, in its exercise, than from the constitution itself. The people, in whom it resided, have voluntarily relinquished its exercise, and have positively ordained that it shall be vested in the General Assembly. It can only be reclaimed by them, by an amendment or abolition of the constitution, for which they alone are competent. To allow the General Assembly to cast it back upon them, would be to subvert the constitution and change its distribution of powers, without their action or consent. The checks, balances, and safeguards of that instrument are intended no less for the protection and safety of the minority than the majority; hence, while it continues in force, every citizen has a right to demand that his civil conduct shall only be regulated by the associated wisdom, intelligence, and integrity of the whole representation of the State.

“But while this is so plain as to be admitted, we think it equally undeniable, that the complete exercise of legislative power by the General Assembly does not necessarily require the act to so apply its provisions to the subject matter as to compel their employment without the intervening assent of other persons, or to prevent their taking effect, only upon the performance of conditions expressed in the law.

“Indeed, the whole body of our legislation, as well as that of every other state, is divided between laws which imperatively command or prohibit the performance of acts, and those which only authorize or permit them. Time and space would both fail me, to refer in detail to all of those of the latter description. A few, however, will serve to illustrate the whole. The county commissioners in each county are authorized, but not required, to erect public buildings, and to erect and establish poor houses, in their respective counties, and to levy taxes for these purposes. In these cases, with many others that might be mentioned, the discretion is vested in the county commissioners. * * *

“But because such discretion is given, are these, and all

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similar enactments, to be deemed imperfect and nugatory? It would take a bold man to affirm it. In what does this discretion consist? Certainly not in fixing the terms and conditions upon which the act may be performed, or the obligations thereupon attaching. These are all irrevocably prescribed by the legislature, and whenever called into operation, conclusively govern every step taken. The law is therefore perfect, final, and decisive, in all its parts, and the direction given only relates to its execution. It may be employed or not employed; if employed it rules throughout; if not employed it still remains the law, ready to be applied, whenever the preliminary condition is performed. The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

“The act under consideration is mandatory in some of its provisions, and leaves a discretion in others. It commands the vote to be taken, and if the subscription is made, it imperatively directs all the subsequent proceedings. But it submits to the discretion of the voters of Clinton county, who are chiefly interested and to bear the burden, if assumed, whether the subscription shall be made, and the law thus fully executed. But this power of deciding upon its execution, so far from being contradictory to or inconsistent with the act, is the condition prescribed by the law making power itself, upon which alone it is permitted to have effect. It is not the vote that makes, alters, or even approves the law, but, as well remarked by one of the counsel, it is the law that makes the vote, and prescribes everything to be done consequent upon it.”

The above decision draws a distinction between the taking effect of a law and its execution or enforcement. The same distinction has been made by this court in several cases. In the case of *The Board of Commissioners v. Spiller*, 13 Ind.

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235, this court say: "It is insisted that the power to organize new counties has never been exercised by direct legislation, and cannot be delegated. The position thus assumed is not, in our opinion, well taken. The act of March, 1857, is a general law of uniform operation, to be executed through the agency of the board of commissioners. And it seems to us, that the power thus conferred, so far as it relates to their duties under the act, is purely ministerial, and not legislative. Indeed, the constitution itself declares, that 'the General Assembly may confer upon the boards doing county business in the several counties, powers of a local, administrative character.' Art. 6, sec. 10. Under this provision, the legislature seems to be plainly authorized to confer the power embraced in the act before us. In cases like the present, the taking effect of the law is not the result of any action on the part of the commissioners; nor do they decide whether the act is or is not in force, but simply whether it applies to the case made by the petition which the act prescribes. This is evidently not the exercise of delegated legislative power, but merely the application of the provisions of a general law to a given case, local in its character."

This court, in the case of *Thompson v. City of Peru*, 29 Ind. 305, say, "The twenty-fifth section of the bill of rights provides, that 'no law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution.' The right of petition, as a condition precedent to the exercise of this power by the common council, if it existed as to subscriptions of stock, would not render this section void under this provision. *The law is in force.* The petition is only *necessary to call into action the power conferred on cities.*"

Judge COOLEY, in his very learned and valuable work on Constitutional Limitations, in discussing the question under consideration, says: "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws, cannot be delegated by that department to any other body or authority. Where the sovereign power of the

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state has located the authority, there it must remain ; and by the constitutional agency alone the laws must be made until the constitution itself is changed. * * * But it is not always essential that a legislative act should be a completed statute which must, in any event, take effect as law, at the time it leaves the hands of the legislative department. A statute may be *conditional*, and its taking effect may be made to depend upon some subsequent event. Affirmative legislation may, in some cases, be adopted, of which the parties interested are at liberty to avail themselves or not, at their option. A private act of incorporation cannot be forced upon the incorporators ; they may refuse the franchise if they so choose. In these cases the legislative act is regarded as complete when it has passed through the constitutional formalities necessary to perfected legislation, notwithstanding its actually going into operation as law may depend upon its subsequent acceptance. We have elsewhere spoken of municipal corporations, and of the powers of legislation which may be, and commonly are, bestowed upon them, and the bestowal of which is not to be considered as trenching upon the maxim that legislative power is not to be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and of England, which has always recognized the propriety of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than central authority. * * *

“For the like reasons, the question whether a county or township shall be divided, and a new one formed, or two townships or school districts formerly one be re-united, or a county seat located at a particular place, or after its location removed elsewhere, or the municipality contract particular debts, or engage in works of local improvement, is always a question which may, with propriety, be referred to the voters of the municipality for decision.”

The learned judge refers to sixty-one decisions made by the

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federal and state courts, in support of the last proposition stated above. See Cooley Const. Lim. 116, 119, and authorities there cited.

If there is no well founded distinction between a law being in force and its execution, then a large number of the laws of this State are not in force. Prior to the adoption of the present constitution, special charters were passed for cities, towns, railroads, canals, manufacturing and trading companies. After the adoption of the new constitution general laws were passed on all these subjects, and there is a provision that any incorporated city, town, or other company acting under a special charter may abandon its rights under the special charter, and may organize under the general laws. If the position assumed by the appellee be correct, these general laws are not in force until those acting under special charters avail themselves of the privilege granted, and if they never accept the provision made for them, then the laws will never be in force. We cannot endorse such a construction. If the execution of a law cannot be made to depend upon the action of the people, then another large class of our legislation will be stricken down. Soon after the adoption of our present constitution, a law was passed authorizing a change of the county seat of Clay county. This law was correctly held by this court to be local and special, and was in conflict with sections twenty-two and twenty-three of article four of the constitution, because a general law could be made on that subject. See *Thomas v. Commissioners of Clay Co.*, 5 Ind. 4. The General Assembly then passed a general law providing for the change of county seats. The General Assembly has also passed a general law providing for the creation of new counties. The boards of commissioners possess no jurisdiction to act under either of these laws, until the matter is presented to them by petition. There has been but one new county created under the general law, and very few applications have been made for the creation of new counties. There have been very few applications made for changes of county seats, and only three.

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or four county seats have been changed. If the position assumed is correct, these laws have not been in force except in those counties where the exercise of the power has been called into existence by the right of petition. The boards of commissioners are authorized, upon petition, to establish new roads, and to change and vacate existing roads. We might refer to many other illustrations, but time and space forbid. In all of the above cases, the taking effect of the laws was not made to depend upon the action of the people, but they were in force as soon as they were passed, under the forms prescribed by the constitution, but the execution of them depended upon whether they were called into exercise in the manner prescribed. We have general laws defining felonies and misdemeanors; will it be maintained that these laws are not in force in every county in the State, because their provisions are not violated, and the courts are not called upon to enforce them?

It is maintained with great earnestness, that the act under consideration was not in force until the vote of the people of Tippecanoe county put it in force. If its being in force depends upon the vote of the people, then it never has been and never can be in force. By what authority was the question submitted to the vote of the people? It was under and by virtue of this act. If it was not in force by virtue of having been passed by the legislature and approved by the governor, then the commissioners of said county possessed no power or authority to submit the question to the vote of the people, and the vote would be nugatory and void. Surely it will not be maintained that a nugatory and void vote can have the force and effect of putting a law in force. Such a principle can be maintained neither on principle nor by authority. That the vote of the people can have no such effect, is settled by the decision of the Supreme Court of the United States in *Aspinwall v. Commissioners of Daviess County*, 22 How. 364.

The case mainly relied upon by the appellees to support their position is the case of *Maise v. The State*, 4 Ind. 342.

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The Maize case was simply this: He was indicted for retailing without license, which he admitted. The act of March 4th, 1853, to regulate retailing, provided that no person should retail spiritous liquors, except for certain named purposes, without the consent of a majority of the legal voters of the proper township, who might cast their vote for license at the April election. No license could be granted to retail in a township where such consent was not given. Thus it was decided that the license law, if it should operate uniformly over the State, was made to depend upon the will of the majority of the voters in every township as expressed at the election, and if that majority chose to remain silent upon the subject or to vote against it in any one township, no license therein could be granted. In short, the construction given by the court was that the act was intended to be a license law or a prohibitory law in the different townships, whichever the voters of each township chose to make it. It was therefore held that that part of the act which required the vote was void, because it made the taking effect of the law depend upon an authority unknown to the constitution, and because the law, if sustained, would be local in its operation where a general law on that subject could be made. The conviction was sustained, however, because he had retailed without license.

The liquor law of March 4th, 1853, was held to be unconstitutional on two grounds, first, because it conflicted with section twenty-five of the bill of rights, which declares, that "no law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution;" second, because it conflicted with sections twenty-two and twenty-three of article four, which prohibit local and special laws. The law under consideration cannot be affected by the constitutional prohibitions against local or special laws. The sixth section of article ten of the constitution makes the subscription of stock depend upon the separate and independent action of each county. While the law may be general and uniform, the exercise of the

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power granted must be local in its operation. Section ten of article six of our constitution provides, that "the General Assembly may confer upon the boards doing county business in the several counties, powers of a local, administrative character." Under this section, the General Assembly may enact a general law conferring upon boards doing county business powers of a local, administrative character, and their acts will not be void because they are local. Local laws may be passed for local purposes.

The principle involved in the case under consideration is clearly distinguishable from that decided in the Maize case. In that case, the law could have been made general, while under the operation of the voting clause it might be prohibitory in one township, and in an adjoining township it would be lawful to retail intoxicating liquors; in one township a citizen was liable to be indicted and punished for an offense, while another citizen in an adjoining township for doing the same thing was guilty of no offense.

The railroad law is general and in force in every part of the State, open to any county or township to avail itself of its privileges upon complying with its terms. It has no double aspect according to the views or consent of the voters in the several townships. There is no essential difference between the vote taken in the mode required and a petition signed by the voters for the county commissioners to appropriate the aid asked. The law requires, as preliminary, that there shall be a duly organized railroad company, that the road to be aided shall run in or through the county or township, that a petition of one hundred freeholders of the former or twenty-five of the latter shall ask the amount desired to aid the road, and notices must be published stating how much is to be voted for; so that each voter when he deposits his ticket "for the railroad appropriation" or "against the railroad appropriation," in effect petitions the county commissioners to grant it or remonstrates against it, according as his ticket reads. The mode of ascertaining the wishes of the voters upon the subject is, for the sake of convenience

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and more especially for certainty, similar to an election for public officers, and was adopted to afford a public opportunity to each county or township to determine, not whether the law shall be in force, but whether the people desire to avail themselves of its privileges.

It is also claimed by the appellee that the act in question violates section one of article ten of our constitution, which provides, that "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation," &c.

This section has received a construction by this court, which shows that it is not obnoxious to the objection urged.

This court, in *Bright v. McCullough*, 27 Ind. 223, say: Section one of article ten "does not require that the rate of assessment shall be uniform and equal for all purposes throughout the State; and we think its meaning clearly is, that the rate of assessment and taxation must be uniform and equal throughout the locality in which the tax is levied. If the levy is for State purposes, then the rate must be equal and uniform in all parts of the State; and if the levy be for county purposes, the rate must be uniform and equal throughout the county in which the levy is made; and so in townships, where the levy is for township or road purposes. It was simply intended that the uniformity and equality of rate should be co-extensive with the territory to which the tax applies."

It was conceded in the argument that the above construction of section one of article ten was correct, but it was maintained that as the railroad extended from Muncie, in Delaware county, through the counties of Madison, Tipton, Clinton, Tippecanoe, and Benton, in this State, it was necessary that each and all of the counties must vote for an appropriation and assess the same amount of tax in each county, to make it uniform and equal. This position is wholly untenable. We have already shown that section six of article ten of our constitution has legalized the subscription of stock by counties, and made it depend upon the separate and independent action of each county, uninfluenced and uncontrolled by the

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action of any other county. If the tax assessed is equal and uniform in the county where assessed, it will be in strict accordance with the requirements of the constitution.

We therefore hold that the law in question is not in conflict with any provision of our constitution.

But it is urged that the proceedings of the Board of Commissioners of Tippecanoe county were irregular and illegal. The objections were presented in argument in detail, but when generalized they amount to three. The first is, that the commissioners changed the places of voting of Fairfield township two days before the vote was taken for or against the appropriation to the railroad.

The second is, that the inspectors in two of the townships made no return of the votes taken therein.

The third is, that the question submitted to the voters of the county was for or against a subscription of stock by the county in said railroad, and thereby excluded from the voters the question of donating the money to aid in the construction of the said railroad.

Section four of the act under consideration reads as follows:

“Sec. 4. The polls shall be opened at the several voting places in the county, or township, as the case may be, by the proper judges and inspectors of election, on the day fixed by said commissioners, and the boards shall be organized and poll books and tally sheets shall be kept, and the whole voting, and taking and certifying of votes, shall be conducted as nearly as may be in the manner provided by law for conducting the voting and certifying the votes at the general election for State and county officers.”

Section four of the election law of May 13th, 1869, provides, that “the board of county commissioners of the proper county, may designate one or more places of holding elections in any township, or form precincts of two or more townships, when public convenience require it.” Acts of 1869, p. 59.

Section fifteen of the act to provide for contesting elections provides as follows:

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"No irregularity or malconduct of any member or officer of a board of judges or canvassers, shall set aside the election of any person, unless such irregularity or malconduct was such as to cause the contestee to be declared elected when he had not received the highest number of legal votes." 1 G. & H. 318.

There is no allegation of fraud; it is not alleged that any legal voter was prevented from voting, or that any illegal voter was permitted to vote. It is stated in the complaint, admitted in the briefs, and was conceded in the oral argument, that if all the votes in the two townships from which no returns were made were counted against the appropriation, there would be a clear majority of all the votes cast in favor of the appropriation.

It was said by this court, at the present term, in case of *Gass v. The State*, *post*, 425, that "it is settled by authority that statutes regulating the mere mode of conducting elections are directory, and that any departure from the prescribed mode will not vitiate an election, if the irregularity does not deprive any legal voter of his vote, or admit a disqualified voter to vote, or cast uncertainty on the result, and has not been occasioned by the agency of the party seeking to derive a benefit from it." Cooley Const. Lim. 617, 618, and authorities there cited.

The following case is much in point: The question submitted to the voters was the removal of a county seat, and it was claimed that there had been gross irregularities in the proceedings of the judges of the election, some of whom were personally interested. The court say: "But the burden of proof is on the contestant to show that there were irregularities, *and that they affected the result.*" In support of this conclusion numerous authorities are cited. Again, the court say: "The facts stated in the notice being admitted by the demurrer, the question presented is, whether these errors or irregularities render void the election in said towns. It will be observed that fraud is not charged, nor is it alleged that any illegal votes were polled, or that any legal votes were excluded. The law requires the judges of elec-

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tion to take the prescribed oath and keep register poll lists, and forbids a candidate at such election to act as one of the judges, but it is in no place provided that a failure to comply with the law in any of these respects shall render void the election. The public good demands that the will of the people as expressed at the ballot-box should not be lightly disturbed. There is hardly an election held in any county in which some irregularities do not occur, and to declare every such election void would work a manifest hardship and injustice. If the votes of the citizens are freely and fairly deposited at the time and place designated by law, the intent and design of the election are accomplished. It is the will of the electors thus expressed that gives the right to the office, or determines the question submitted, and the failure of the officers to perform a mere ministerial duty in relation to the election cannot invalidate it, if the electors had actual notice and there was no mistake or surprise." *Taylor v. Taylor*, 10 Minn. 107.

Where the question of aiding a railroad by a county subscription was submitted to the voters, and the sheriff was required by statute to have the polls opened to receive the votes, but failed to do it at one precinct, wherefore it was claimed the voting was void, the court, after a careful consideration of the point, decided: "The failure of the sheriff to have the polls opened at one precinct does not invalidate. To have that effect it must appear also by the facts that such failure did or might have affected the general result of the contest." *L. & N. R. R. Co. v. County Court*, 1 Sneed, 637.

There is no doubt that the board of commissioners possessed the power to designate the places of holding the election. The law does not prescribe the time when it shall be done, nor does it require any notice to be given when there is a change of places of holding the election. If the votes given in the two townships from which no returns were made would have changed the result, the consequences would have been very different. The law regards the substance, and not mere forms. It is the duty of the courts to

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carry out the will of the people as expressed at the ballot box, where the only objections urged are mere irregularities. On the other hand, it is the duty of the court to set aside an election whenever and wherever the will of the people has been defeated by unfairness and fraud. In the case under consideration, there was no unfairness or fraud. The vote polled was a large one. The majority of the votes cast was about six hundred. The votes cast for the appropriation did not fall much short of a majority of all the legal votes in the county. Under such circumstances, we cannot hold the election void for mere irregularities that in no manner affected the result. In doing so we would perpetrate a great wrong.

The third and last objection has given us more trouble. When the commissioners ordered a vote to be taken, they adopted a resolution to the effect that if the vote of the county was in favor of an appropriation, they would subscribe for stock in said railroad, for and on behalf of the county. This resolution was published in the election notice. The vote, however, was taken according to the law, "For the Railroad Appropriation," and "Against the Railroad Appropriation." The fourteenth section of the act provides, that after the vote and after a part of the tax is collected, the board of commissioners may either take stock in, or donate money to, the company. The members composing this court have been unable to agree upon this question. DOWNEY, J., is of the opinion that the board of commissioners possessed no power to exercise the discretion vested in them until after the vote, and after a part of the tax was collected, and the giving of notice to the voters that a vote on subscription of stock only would be taken may have prevented persons from attending the election and voting, who would have done so if they had supposed that the money, when collected, would be donated to the said railroad company. While concurring with the opinion of the court upon the other questions decided, he feels constrained to dissent from the judgment of the court, for the cause aforesaid.

PETTIT, C. J., and WORDEN, J., are of the opinion that the

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resolution of the board declaring their purpose to subscribe for stock had no legal effect, and did not influence the action of the voters, or in any manner change the result of the vote. They regard the resolution as merely advisory, and that it was adopted for the sole purpose of obtaining the wishes and preferences of the voters and tax payers, to guide the commissioners in the exercise of the discretion vested in them, when the proper time should arrive to make the decision. BUSKIRK, J., is of the opinion, that under the sixth section of article ten of our constitution, the legislature possessed no constitutional power to authorize the board of commissioners of a county to levy a tax, and, when collected, donate the money to a railroad company, and that, therefore, the commissioners submitted to the voters of the county the only proposition that they had a right to vote on.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to sustain the demurrer to the complaint, and dissolve the injunction, and for further proceedings in accordance with this opinion.

Coffroth & Ward, J. A. Stein, W. C. Wilson, R. P. De Hart, Chase & Wilstach, J. Hughes, and J. E. McDonald, for appellants.

Jones, Miller & Stallard, Hendricks, Hord & Hendricks, R. P. Davidson, and Wallace & Hiatt, for appellee.

THE INDIANAPOLIS AND CINCINNATI R. R. CO. v. STURM.

APPEAL from the Dearborn Common Pleas.

PER CURIAM.—This case comes before us solely on the evidence, which we have examined with some care, and which, we conclude, with some hesitation, sustains the finding below.

The judgment below is affirmed, with costs.

D. S. Major and O. B. Liddell, for appellant.

W. H. Bainbridge, for appellee.

GREENE and Another v. BARTHOLOMEW.

CONSIDERATION.—*Assignment of Contingent Interest.*—A. gave his promissory note to B. in consideration of the assignment to the former by the latter of all his right, title and interest in a contract between B. and C. and a life insurance company, by which B. and C. were to act as agents of said company in a designated territory, and for their services the company was to pay them a certain per cent. on all first premiums, and a certain per cent. on all renewals collected by them on business secured by them or their agents. At the time of said assignment, B. claimed that there would be due him, under said contract, commissions on premiums yet to be collected.

Held, in a suit on said note, in which it was not shown that there was any fraud in the transaction, and it did not appear that A. had not obtained all the benefits that he expected from the assignment, that the assignment was a sufficient consideration for the note.

APPEAL from the Marion Common Pleas.

WORDEN, J.—This was an action by the appellee against the appellants, upon a promissory note, executed by the latter to the former.

Issue, trial, verdict and judgment for the plaintiff below.

The substance of the defense was want of consideration, failure of consideration, and fraud. No question arises on the pleadings.

It appeared that on the 16th of October, 1866, the plaintiff Bartholomew and one Benjamin F. Seward entered into a written contract with the Berkshire Life Insurance Company, a Massachusetts corporation, by virtue of which Bartholomew and Seward were to act as agents of the company in the State of Indiana, and to devote their time, skill and ability to the service of the company, in and about the business of life insurance, for which services the company was to pay them "a commission of thirty per cent. on all first premiums, and seven and a half per cent. on all renewals collected by them on business secured by them or their agents," &c.

On the 21st of May, 1868, the date of the note in suit, Bartholomew, by an instrument in writing, assigned, set over and transferred to the defendant Greene, all his right, title and interest in the contract. This assignment was the con-

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sideration of the note sued upon, the defendant Tilford putting his name upon it for the accommodation of Greene. It further appeared on the trial, that before the assignment was made and the note executed, Greene had been acting as district agent of the company under Bartholomew, and that the latter, at the time of the transaction, claimed that there would be due him, on premiums to be yet collected, between three and four thousand dollars, and it was arranged that time should be given on the note, so that it might be met by the commissions on the incoming premiums. Greene agreed also to pay to the company, in part consideration for the assignment, the sum of three hundred dollars, which Bartholomew then owed it. It may be here observed that no fraud whatever is shown in the transaction, nor does it appear but that Greene obtained all the benefits that he expected from the assignment.

Various questions are made on the rulings of the court in relation to evidence, instructions, interrogatories propounded and proposed to be propounded to the jury, and motions for judgment on the special findings; but these may all be resolved into one general question, viz.: Was the assignment of the contract by Bartholomew to Greene a sufficient consideration for the note? If this question is to be answered affirmatively, no error was committed below, that in any way tended to the injury of the appellants.

It is insisted by counsel for the appellants, that inasmuch as the assignment of the contract could not, without the assent of the company, place Greene in the shoes of Bartholomew and make him the agent of the company in the place of Bartholomew, and inasmuch as by the terms of Bartholomew's contract with the company, he was not entitled to any commission on premiums that he did not collect, no value or valuable right passed to Greene by the assignment, and therefore, that it was insufficient as a consideration to support the note. This view is not destitute of much plausibility and considerable force; but, on reflection, we are of opinion that it cannot be maintained.

It is not necessary that the assignment should have been such as to invest Greene with a present right that he could have legally enforced against the company, in order to make it a good consideration for the note. It is sufficient if Bartholomew transferred or surrendered to Greene a right or interest which was valuable to him, whether it turned out to be valuable to Greene or otherwise.

A clear and concise statement of the law on the subject, is made by an author of celebrity, as follows: "Any benefit accruing to him who makes the promise, or any loss, trouble, or disadvantage undergone by, or charge imposed upon him to whom it is made, is a sufficient consideration in the eye of the law to sustain the promise." Smith Con. 164.

Suppose that Bartholomew had no earned commissions coming to him, but had the contract in question, and was acting as agent of the company under it, and that Greene, being desirous of procuring the same agency and employment, but being unable to do so while Bartholomew held such agency under his contract, should purchase the contract from Bartholomew and take an assignment thereof to himself as a step towards accomplishing his desired purpose. It can hardly be said, in such case, that Greene's agreement to pay the stipulated price for the assignment of the contract would be without consideration, whether he finally obtained the agency or not. But the case under consideration is much stronger than the one supposed. Here Bartholomew had commissions earned on premiums not yet collected, which he had a right, under his contract, to go on and collect. When he assigned the contract to Greene, he deprived himself of all right to make the collections for his own benefit. "A valid assignment may be made of the expected, though contingent, avails of future transactions under an existing contract; as of compensation not yet earned, but to be earned under an existing contract, although subject to a contingency whether it will ever be earned." Chitty Con. (10th ed.) 134. See, also, on this subject, 1 Story Con. § 376, *g*, and notes; *Bracket v. Blake*, 7 Met. 335; *Hartley v. Tapley*, 2

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Gray, 565; *Emery v. Lawrence*, 8 Cush. 151; *Weed v. Jewett*, 2 Met. 608; *Taylor v. Lynch*, 5 Gray, 49; *Gardner v. Hoeg*, 18 Pick. 168; *Field v. The Mayor, &c., of New York*, 2 Seld. 179. In the case last cited it was held, that "an assignment for a valuable consideration of demands having at the time no actual existence, but which rest in expectancy merely, is valid in equity as an agreement, and takes effect as an assignment when the demands intended to be assigned are subsequently brought into existence." In *Whittle v. Skinner*, 23 Vt. 531, it was held, that although an assignment by a partner of his share of the unsettled accounts of the partnership did not vest any right in the assignee until the accounts were settled and the balance, if anything, ascertained, yet that such assignment was a sufficient consideration for a promise.

In the case before us, we do not determine what rights the assignment in question gave to Greene as against the corporation, nor do we determine what change in the relationship of Bartholomew to the company was effected, if any, by the assignment. These questions are not before us. We hold simply that as Bartholomew sustained a loss and underwent a disadvantage by the assignment, inasmuch as thereby he deprived himself of rights that he enjoyed under the contract, the assignment was a valid consideration for the note sued upon.

The judgment below is affirmed, with costs, and two per cent. damages.

J. T. Dye and *A. C. Harris*, for appellants.

P. W. Bartholomew, for appellee.

CITY OF GOSHEN v. CROXTON.

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PLEADING.—*Mayor's Court.—Complaint for Violation of Ordinance.*—An action commenced before the mayor of a city incorporated under the general law for the incorporation of cities, to recover a penalty for the violation of a city ordinance, is a civil suit in which an appeal may be taken under the same restrictions as if the action were commenced in a justice's court; and the complaint, if it conform to the requirements of section nineteen of said general law, need not be more technical or full than in a civil suit commenced before a justice of the peace.

APPEAL from the Elkhart Circuit Court.

PETTIT, C. J.—This suit was commenced before the mayor of the city, for the violation of one of its ordinances. Judgment for the city, from which Croxton appealed to the circuit court, where, on his motion, the case was dismissed for want of a sufficient complaint. The correctness of this ruling is the only question for our consideration. The complaint is as follows:

"The City of Goshen v. Lafayette J. Croxton. Before U. D. Wilson, Mayor of the City of Goshen. The City of Goshen complains of Lafayette J. Croxton, and says that on or about the 21st day of January, 1869, at the county and State aforesaid, and within the limits of the city of Goshen, the said defendant did then and there violate section eight of an ordinance of said city, which ordinance was duly passed by the common council of said city, on the 25th day of May, 1868, and duly published according to law, by then and there unlawfully, in a rude, insolent, and angry manner, touching and striking Cyrus Smurr, and then and there at and against said Smurr, unlawfully and purposely, shooting a certain pistol, commonly called a revolver, then and there loaded with gunpowder and leaden ball, which he, the said Croxton, then and there, in his hands, had and held, and then and there wounding, by said leaden ball, the said Cyrus Smurr.

(Signed)

CYRUS SMURR.

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Subscribed and sworn to before me, this 21st day of January, 1869. U. D. WILSON, Mayor."

The seal of the city was affixed to it. "Wherefore, the said city demands judgment for one hundred dollars and other proper relief. J. D. OSBORN, Att'y for Plaintiff."

In the seventeenth section of the general law for the incorporation of cities, it is provided, that in all actions before the mayor, an appeal may be taken to a court of competent jurisdiction, under the same restrictions and in the same manner as in a justice's court. The same rules of pleading and practice shall be observed in the mayor's court, that are in a justice's court.

The nineteenth section of said act is as follows:

"SEC. 19. All actions brought to recover any penalty or forfeiture incurred under this act, or ordinances made in pursuance thereof, shall be brought in the corporate name of such city. The process in every such action shall be a warrant, and the person named in such warrant shall be arrested and retained in custody or under reasonable recognizance, until the next sitting of the city court, and it shall not be necessary to file with the affidavit or complaint a copy of the ordinance, or section thereof, charged to have been violated, but it shall be sufficient to recite in the affidavit or complaint the number of the section charged to have been violated, with the date of its adoption; nor shall it be necessary to copy any part of the affidavit, complaint, or other pleadings in the record of the cause: *Provided*, That the mayor shall note upon his docket the parties to the action, the title to the cause, the filing of the complaint or affidavit, the issuing and return of process, and the judgment and proceedings had in the cause, and the satisfaction of judgment when paid."

A suit before the mayor to recover a penalty for the violation of a city ordinance, though a warrant for the arrest of the defendant may be issued and served, is a civil suit, and the rules of practice in civil suits apply and are to be observed on the trial. This complaint certainly is as technical

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and full as could be required in a civil suit before a justice of the peace; and we think it would be a good affidavit in a criminal case, and that it contains all the substantial requisites of an information or indictment, to put a party on trial in a superior court. "The section violated and the date of the adoption of the ordinance" are recited in the complaint, and this is all that is necessary to make it good by the nineteenth section of the law above referred to.

The court erred in sustaining the motion to dismiss, and for this error the judgment must be reversed.

The judgment is reversed, at the costs of the appellee; cause remanded, &c.

J. D. Osborn, for appellant.

J. H. Baker and *J. A. S. Mitchell*, for appellee.

JACKSON v. SNELL and Others.

VENDOR AND PURCHASER.—Injunction.—Where, the purchaser of real estate having taken from the vendor his agreement to convey the same to said purchaser upon final payment of the purchase-money, and having received possession of the land under the contract, and having given his promissory notes governed by the law merchant to the vendor for the unpaid purchase-money, the vendor sells and assigns said notes before maturity, said real estate cannot be subjected to the payment of a judgment rendered against the vendor, retaining the legal title, after such assignment; and the sale of the land under an execution issued on such judgment will be enjoined at the suit of said purchaser.

APPEAL from the Madison Circuit Court.

DOWNEY, J.—The only error assigned in this case is the sustaining of a demurrer to the complaint. The complaint was filed by Jackson against Snell, as sheriff, and certain other persons, as execution plaintiffs, to prevent, by injunction, the sale of certain real estate on execution. The suit.

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was commenced in the common pleas and transferred to the circuit court, because the title to real estate was, or was supposed to be, brought in question.

The facts are, that on the 4th day of September, 1865, the plaintiff bought of one Andrew Jackson certain real estate, and took from him an agreement to convey, on the final payment of the purchase-money, which amounted to thirty-two thousand three hundred and forty dollars, as per promissory notes given, one for \$10,782.33, due in twelve months; one for \$10,782.33, in two years; and one for \$10,782.33, in four years, negotiable and payable at the Branch of the Bank of the State at Indianapolis; that the plaintiff took, and has ever since the date of said agreement held possession of said real estate, except the part sold by him and conveyed by Andrew Jackson by his order.

The complaint then alleges the recovery of sundry judgments by divers persons against Andrew Jackson, in 1867 and 1868, the issuing of executions thereon and their levy on part of the land so purchased by the said plaintiff, and advertising the same for sale. The real estate levied on consists of six tracts, and it is alleged that the last named one is worth in cash forty thousand dollars, and more; while the total of the execution is only seven thousand seven hundred and sixty dollars, besides costs; that all of said real estate is susceptible of division; that some of the executions were *functi officio*, having been in the sheriff's hands more than six months; that he had paid of the purchase-money for said real estate, twenty thousand dollars, and the residue of the notes for the balance of the purchase-money had all been sold and assigned by said Andrew Jackson, and are governed by the law merchant, and were assigned before they became due; that judgment was obtained against him at the September term, 1868, of the common pleas of said county, for over six thousand dollars; and that said payments were made and said notes assigned before he had any actual notice that the judgments on which the executions were issued were obtained, and the most of said payments were

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made before any of said judgments were obtained, and said notes assigned *before any of said judgments were obtained*, as he is informed and believes; that the said Andrew Jackson is only surety for other parties in one of the judgments, the other parties having property out of which the judgment might be made; that said Andrew has commenced his action to have himself declared surety and for an order that the property of the principals shall be first sold, &c.; that he bought all of said real estate in good faith, without intending to cheat any one, paid the full value thereof at the time, is an innocent purchaser, having no notice of any lien or claim of any person on the same at the time of his purchase, and all his payments have since been made in good faith, and without any intent to defraud any person; that, as he is informed and believes, he has no defense against the payment of the residue of the purchase-money, in any action on the residue of the notes; that one tract of thirty acres of the real estate levied on, described in the complaint, is worth eight thousand dollars, being more than all the judgments levied on the entire lands; and that the sheriff has made the levy at the request of said plaintiffs in said judgments.

Wherefore he prays the court to grant a restraining order prohibiting the said sheriff from selling said real estate, and that the court will, on the final hearing, grant a perpetual injunction, and set aside the levy as excessive; and in the case where the said Andrew Jackson is surety only, restrain the sheriff from selling his property until the property of the principals shall have been sold. This complaint was verified by the complainant.

In *Garr v. Lockridge*, 9 Ind. 92, it is decided, that the estate which the vendor has in lands contracted to be sold, but not conveyed, is subject to the lien of judgments obtained against the vendor after the contract of sale, for the amount of the purchase-money unpaid. This must mean, of course, the purchase-money yet due to the vendor. In this case, the vendor, Andrew Jackson, had retained the legal estate as security for the ultimate payment of the purchase-money.

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But this lien or security for the payment of the purchase-money had passed from him before the rendition of the judgments and accompanied the promissory notes, which he had assigned away, and which, being negotiable as inland bills of exchange, might be enforced against the plaintiff or against the land at their maturity. That the lien of the vendor was assignable and passed with the notes, is decided in *Brumfield v. Palmer*, 7 Blackf. 227; *Fisher v. Johnson*, 5 Ind. 492; *Kern v. Hazelrigg*, 11 Ind. 443; *Johns v. Sewell*, 33 Ind. 1.

In *Amory v. Reilley*, 9 Ind. 490, this court say, "Where the original vendor has not parted with the legal title, it must be intended that he holds it as security for unpaid purchase-money; and all the incidents of a mortgage, so far as the lien is concerned, attach to the contract of sale. An unpaid vendor" (and we may add, or his assignee) "is entitled to proceed as a mortgagee."

It is well settled, that the assignment of a debt secured by a mortgage carries with it the mortgage security, and where there are several notes secured by the same mortgage, and they are assigned to different persons, the security is distributed accordingly, and the mortgage becomes or continues security for them all, with priority according to the order in which they mature. *Gower v. Howe*, 20 Ind. 396; *Sample v. Rowe*, 24 Ind. 208.

But Andrew Jackson had no longer any interest in the lands, even as a mortgagee; for he had parted with the indebtedness for which he held the land as a security. He had no interest in the land except as a trustee of a naked trust. See *Johnson v. Cornett*, 29 Ind. 59.

Conceding the facts as stated in the complaint, which must be done for the purposes of a decision of this question, and we think the sheriff's sale ought to have been enjoined.

The judgment is reversed, with costs, and the cause remanded, with directions to overrule the demurrer.

W. R. Pierse and *H. D. Thompson*, for appellant.

J. W. Sansberry, for appellees.

Beaver v. The President and Trustees of Hartsville University.

BEAVER v. THE PRESIDENT AND TRUSTEES OF HARTSVILLE
UNIVERSITY.

PLEADING.—*Fraud.—Promissory Note.*—Suit by the president and trustees of a university on promissory notes executed by the defendant to the plaintiff. Answer, that the notes were given upon the representation of the plaintiff's agent to the defendant, that, by the execution of the notes, he would become entitled to a perpetual scholarship in said university, and be entitled to send a scholar to said university free of further cost or charge of any kind; that the officers of said school were prepared to furnish employment to all pupils, by which they could pay their board and all other expenses; that the school was conducted on such a plan that the cost of the scholarship was all that was required to be paid by its patrons; that the school was the best in the State; that its professors and teachers were as competent as those of any other institution of learning in the State; that the school buildings were in good repair, and fitted up with a view to the health, comfort, and convenience of the scholars; that the society of the neighborhood was of the highest moral character; that the grounds and lands belonging to the school and adjoining its buildings were under a high state of cultivation and improvement; that the students were constantly under the care and charge of the officers and teachers of the school, and furnished with boarding on the premises; that the table of the boarding department was constantly supplied with a sufficient amount of wholesome and nutritious food; that every care was taken to preserve the health and elevate the morals of the students, and render their school life pleasant and homelike; and it was alleged that the school was organized and conducted under the control of a certain religious organization, of which said agent was a preacher and the defendant a member; that defendant could not read or write; that relying on the representations of said agent, and placing confidence in him as a minister of the gospel, and believing in his honesty and integrity, the defendant was induced by such representations to sign said notes, and did so solely in consequence thereof; and that said representations were false and fraudulent.

Held, that the answer was good on demurrer.

Held, also, that the facts that a certificate for the scholarship was to be issued to the maker of said notes, and that this had not been done, could not constitute a defense to a suit on the notes.

Held, also, that an answer alleging that the plaintiff falsely and fraudulently represented to the defendant that he should not be required to pay the principal of the notes, but only the interest thereon, was bad on demurrer.

SAME.—*Consideration.*—It is a good answer to a suit on a promissory note, by the payee against the maker, that it was executed without any consideration.

SAME.—*Corporation.*—In a suit on a note executed to a corporation, the maker cannot deny the existence of the corporation at the time of the contract; and

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its continued existence will be presumed, unless it be shown to have terminated in some way known to the law.

PRACTICE.—*Production and Inspection of Writings.*—There is no error in refusing to grant an order, at the request of a party, requiring the adverse party, a corporation, to produce its record books for inspection and use on the trial, where the books are at a considerable distance from the court, and it is not shown by affidavit that there are any entries in them which would afford material evidence, or that any request has been made for copies of such entries, if there be any such.

APPEAL from the Fountain Common Pleas.

DOWNEY, J.—Suit on five promissory notes executed by the appellant to the appellee.

There were six paragraphs of the answer, all of which were held bad on demurrer, and, for want of a better answer, judgment was rendered against the appellant.

The first paragraph alleges, that the notes were given for a perpetual scholarship in said university; that they were obtained from defendant by the fraud, covin, and misrepresentation of the agent of the plaintiff, who represented to him that by the execution of the notes he would become entitled to a perpetual scholarship in said university, and be entitled to send a scholar to said university free of further cost or charge of any kind; that the officers in charge of said school were prepared to furnish employment to all pupils, by which they could pay their board and all other expenses; that the school was conducted on such a plan that the cost of the scholarship was all that was required to be paid by its patrons; that the school at said university was the best in the State; that its professors and teachers were all as able and competent as those of any other institution of learning in the State; that the buildings belonging to the school were all in good repair, and were fitted up with a view to the health, comfort, and convenience of the scholars; that the society of the surrounding neighborhood was of the highest moral character; that the grounds and lands belonging to the school, and adjoining its buildings, were under a high state of cultivation and improvement; that the students were constantly under the care and charge of the officers and teachers

of the school; that they were furnished boarding on the premises; that the table of the boarding department was constantly supplied with a sufficient amount of wholesome and nutritious food; that every care was taken by those in charge of the school, to preserve the health and elevate the morals of the students under their charge, and to render their school life pleasant, homelike, and agreeable; that it was organized and conducted under the control of the United Brethren Church; that said agent was a preacher in that church, and the defendant a member thereof; that defendant cannot read or write; that, relying on the representations of said agent, and placing confidence in him as a minister of the gospel, and believing in his honesty and integrity, he was induced by such representation to sign said notes; that he did so solely in consequence thereof; and that said representations were false and fraudulent.

We have looked to the brief of the appellee's attorneys for the reasons why this is not a good defense.

It is insisted, that when a contract has been reduced to writing, the presumption is that the writing contains the whole contract; that oral negotiations which precede or accompany the execution of the instrument are merged in the writing.

This is a correct statement of a rule of law. But we think it not applicable to this case. The rule does not prevent a party to a contract which has been reduced to writing from showing that he was induced by false and fraudulent representations to enter into the contract.

Again, it is insisted that the representations were not such as the defendant had a right to rely upon. We think this is true as to some, but not all of them. It is said that the defendant might, by inquiry, have ascertained for himself the truth or falsity of the matters which it is alleged were represented.

We think he was not bound to do this, but might rely upon the representations. The demurrer admits that all these representations were made, that they alone induced the defendant to sign the notes, and that they were false. We

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think the paragraph a good defense, and that the court erred in sustaining the demurrer to it.

The second paragraph sets up that a certificate for the scholarship was to be issued to the defendant, which has not been done.

This was not a good defense. The certificate would not confer the right, but would be evidence of it. See *The New Albany and Salem Railroad Co. v. McCormick*, 10 Ind. 499.

The third paragraph was, that the notes were executed without any consideration. This was clearly good, and the demurrer to it should have been overruled. *Webster v. Parker*, 7 Ind. 185.

The other paragraphs are in an additional answer, and are also numbered one, two, and three.

The first of these attempted to show that the university ceased to be a corporation after the execution of the notes on which the suit is brought. The only ground for this assertion is, that the trustees resolved that the location was an unfortunate one and endeavored to get subscriptions at other points, with a view to its location at one of them. But the people at Hartsville made the largest subscription and retained the institution at that place. We think this is no defense.

In the second paragraph in the additional answer, the defendant alleges that the plaintiff falsely and fraudulently represented to him that he should not be required to pay the principal of the notes, but only the interest thereon, &c.

We think this was not such a representation as can be successfully relied upon to show fraud. If such was a part of the contract it should have been in the notes. It was not a misrepresentation with reference to an existing fact. The allegation that the representation was falsely and fraudulently made does not alter the case.

The third paragraph of the additional answer denies the existence of the corporation and its power to make the contract.

This, we think, is not a good defense. The defendant can-

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not deny the existence of the corporation at the time when he executed the notes. We should presume its continuance unless it be alleged and shown that its existence was terminated in some way known to the law.

It is assigned for error, that the court erred in refusing an order, at the request of the defendant, upon the plaintiff, to produce, on a day named, the record books of the corporation, for his inspection and use at the trial of the cause. The books were at a considerable distance from the court, and it was not shown by affidavit that there were any entries in them which would afford evidence material to the questions involved in the issues; nor was it shown that any request had been made for copies of such entries, if there were any such entries. We cannot say that it was error to refuse the order.

The judgment is reversed, and the cause remanded. Costs to the appellant.

T. F. Davidson, for appellant.

W. A. Tipton, for appellee.

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159	619

HUSBAND AND WIFE.—*Wife's Separate Property.*—A married woman, in 1865, loaned to her husband a sum of money belonging to herself. Afterwards said husband traded a stock of goods to a third person, in part payment for a tract of land, the deed being taken in the name of the wife, who executed notes and a mortgage on the land for the residue of purchase-money, said conveyance being procured to her and received by her in payment of the money so loaned by her to her husband.

Held, in an attachment proceeding by the husband's creditors, that, in the absence of actual fraud, the wife was to be regarded as a purchaser for a valuable consideration, and was entitled to hold the land.

FRAUDULENT CONVEYANCE.—Where it is sought to subject lands to the payment of debts because of a fraudulent conveyance, it must be shown that the grantee had notice of the fraudulent intent.

APPEAL from the White Circuit Court.

WORDEN, J.—This was an action by the appellee, the skirt

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company, against Ulysses C. Kyger, to recover an account for one hundred and eighty-nine dollars. An attachment was issued in the case, which was levied upon certain real estate as the property of said Ulysses, and the appellant, Margaret, his wife, was made a defendant, to answer as to her interest in the same. She appeared and answered. Other creditors of Ulysses filed their claims under the attachment.

On the trial of the issues joined, by a jury, there was a verdict for the plaintiff, followed by a judgment and order for the sale of the land. Margaret alone appeals.

On the trial, it appeared by the evidence, which is all in the record, and mostly consists of the answers of parties to interrogatories and depositions, that in the fall of 1865, Margaret had the sum of five thousand nine hundred dollars in money belonging to herself, which was the product of a sum which she originally received from her father's estate, and which had been so invested as to produce the sum above named. This sum she then loaned to her husband.

Afterwards, in 1868, Ulysses traded a stock of goods to John W. Godman, or to him and Minerva, his wife, as part pay for the land in question, and the deed was taken to said Margaret, who executed notes and a mortgage on the premises for the residue of the purchase-money, amounting to thirty-five hundred dollars. This land was thus procured to be conveyed to said Margaret, and by her received, in payment and discharge of the debt due her from her husband for the money loaned him as above stated. It is claimed that the transaction was fraudulent, and that the land was liable for the debts of the husband. On the supposition that there was no actual fraud in the transaction, there can be no doubt that the appellant is to be regarded as a purchaser for a valuable consideration, and entitled to hold the land. She was the creditor of her husband for the money loaned, and as much entitled to payment as if she had been a *feme sole*. Where there is no fraud, a debtor has a right to prefer one creditor over another.

We have examined the evidence with some care, and do

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not find that it establishes any actual fraud; and especially, we think it fails to establish any notice of fraudulent intent as against the appellant. This was necessary in order to deprive her of the land. *Bunnel v. Witherow*, 29 Ind. 123. *

The alleged fraud not being established, the judgment below, as against the appellant, must be reversed.

The judgment below, that the attachment proceedings be sustained, and that the attached property is liable for the payment of the judgment, and that the same be sold for the payment thereof, and that the title thereto of the appellant is void, and that she be forever restrained and enjoined from setting up or asserting any claim or title thereto, is reversed, with costs, and the cause is remanded.

E. Hughes, for appellant.

S. T. McConnell, *M. Winfield*, and *W. C. Lamb*, for appellees.

FETTERS v. THE MUNCIE NATIONAL BANK.

BILL OF EXCHANGE.—Accommodation Indorser.—Application of Paper to Particular Purpose.—A bill of exchange was indorsed for accommodation, to enable one to raise money, in the application of which the indorser had no interest; and he for whose accommodation it was indorsed, instead of so using the bill, used it to pay a pre-existing debt.

Held, that such appropriation of the bill did not release said indorser from liability on the bill in the hands of one who had received it with notice of these facts.

SAME.—Blanks.—Where a bill of exchange has been drawn, accepted, and indorsed, with blanks for the date, amount, and time, and in this condition delivered to one to whom the drawer was at the time indebted, or to whom the drawer and acceptor were indebted, to be used in renewal of paper formerly given for such indebtedness, with direction to such creditor to fill up said blanks with the proper date, amount, and time, when said former paper should become due, an accommodation indorser will not be released from liability on said bill by the fact that when said former paper became due and said blanks were thereupon filled by said creditor, said drawer and acceptor, solvent at the

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time the bill was drawn, accepted, and indorsed, had become insolvent, of which the creditor had notice when he filled said blanks.

PRACTICE.—*Open and Close.*—Whenever it devolves upon the plaintiff to make any proof as to the facts necessary to make out his case, or as to the amount which he ought to recover, he has the right to open and close the evidence and the argument.

APPEAL from the Delaware Common Pleas.

DOWNEY, J.—This action was brought by the appellee against one Oakerson and the appellant, on a bill of exchange, dated April 24th, 1867, drawn by Henry Jacobs on Oakerson & Co., in favor of Stephens, accepted by Oakerson & Co., and indorsed by Stephens and the appellant. There was a stipulation in the bill to pay all attorneys' fees, and the costs and charges for the collection of the bill; and it is alleged that a reasonable attorney's fee would be two hundred dollars.

Oakerson made default. After a demurrer to the complaint by the appellant, which was overruled, an answer in abatement and a demurrer thereto, which was sustained, concerning none of which is there any complaint here, he answered in five paragraphs, to each of which there was a demurrer, which was overruled. The plaintiff replied in five paragraphs. There were demurrers to the third, fourth, and sixth paragraphs of the reply, which were overruled.

There was a trial by the court, and finding and judgment for the plaintiff. At the proper time, the defendant demanded the right to open and close, which was denied him.

There was a motion for a new trial for the following reasons: first, the court erred in permitting the entry from the books of the plaintiff to be read in evidence over defendant's objection; second, in giving the opening and close of the evidence and argument to the plaintiff; third, the damages are excessive; fourth, the finding of the court is contrary to the law and evidence.

This motion was overruled, and the defendant excepted. The bill of exceptions does not set out all the evidence, but does show that the defendant, at the proper time, demanded

the open and close; that his demand was refused, and the open and close awarded to the plaintiff.

The defendant, the appellant, now assigns for error: first, the denial of the right to open and close; second, overruling the motion for a new trial; third, overruling the demurrers to the third, fourth, and sixth paragraphs of the reply.

The question with reference to the overruling of the demurrers to the paragraphs of the reply was properly reserved by exception.

The appellant was an accommodation indorser of the bill of exchange on which this action is brought, and the answer and reply present the question whether it is a good defense for an accommodation indorser to show that he indorsed the bill to enable the party for whom he indorsed to raise money, and that instead of using it for that purpose, he used it in payment of a pre-existing debt, the party receiving it and afterwards suing on it having notice of that fact, but the indorser having no interest in the application of the money.

In reason, there would seem to be but one answer to this proposition, and that is, that as the party who sells the bill, and who in this case was the party for whose accommodation it was indorsed, on receipt of the money would be the absolute owner thereof, and have the power to do what he pleased therewith, and might use it at once to pay the pre-existing debt, it could make no material difference to the accommodation indorser whether the bill was transferred for money or in renewal of the paper for the previous indebtedness. There is no allegation in the answer that the party negotiating the bill was to apply the money to any purpose or object, in its application to which the indorser had any interest whatever.

We are referred by the counsel for the appellant to 2 Parsons on Notes and Bills, 27, where he says, "If, however, the accommodation is given for a particular purpose, and that is known to the holder of the paper at the time he takes it, a misappropriation of the paper would release the party giving the accommodation from all responsibility." We have examined,

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carefully, the authorities referred to by the author in support of this general statement, and find that they would not justify its application to this case.

Where there is no limitation or restriction as to the manner in which an accommodation note or bill is to be used, the payee has a right to apply it to the payment or security of an antecedent debt, or to sustain his credit in any other way. *Cole v. Saulpaugh*, 48 Barb. 104; *Schepp v. Carpenter*, 49 Barb. 542.

The accommodation party must have some interest in the application of the money, otherwise he is not in a condition to contend successfully that there has been a misapplication of it, or of the security on which it was to be raised. *Purchase v. Mattison*, 6 Duer, 87; *De Zang v. Fyfe*, 1 Bosw. 335; *Moore v. Ward*, 1 Hilton, 337.

Another question presented by the answer and reply is this: Jacobs, or Jacobs and Oakerson, owed a debt to the bank, and the bill on which this suit was brought was drawn, accepted, and indorsed, with blanks for the date, amount and time it should run, while Jacobs and Oakerson were solvent, and in this condition was left with the bank to be used in renewal of the former paper, with directions to the cashier of the bank, when the former paper matured, to fill up the new bill, so deposited with the bank, with the proper date, amount, and time. But before the time arrived when the new bill was thus filled up, Jacobs and Oakerson had become insolvent, and Jacobs had left the State. It is alleged in the answer, that the bank knew of the insolvency of these parties, &c., when the bill on which this suit is brought was filled up. This, however, is denied by the bank. We do not think that these facts constituted any defense. The bank had acquired an interest in the paper when it was deposited with her to be used in renewal of the former paper, which could not be affected by the subsequent insolvency of Jacobs and Oakerson.

It is objected to the fourth paragraph of the reply, that it departs from the complaint. But we think the position can-

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not be maintained. It proceeds upon the supposition that the defendant had been discharged from liability on the bill, and that it was attempted to make him liable by matter occurring afterwards. But as we have seen that he was not discharged by reason of anything which had occurred, the objection will not hold good.

There is one other question in the record, and that relates to the right to open and close. Each party claimed it, and the court awarded it to the plaintiff.

It is not to be denied that the decisions of this court are somewhat inharmonious on this point. In this case, a part of the cause of action was the amount of the attorneys' fees, which the parties to the bill had stipulated to pay, which, it was alleged, were reasonably worth two hundred dollars. Notwithstanding the paragraphs of the answer were special, and no general denial was in, the statute itself controverts the amount of damages, by declaring that allegations of value or amount of damages shall not be considered as true by the failure to controvert them. 2 G. & H. 100, sec. 74. We think that whenever the plaintiff has any proof to make, either as to the facts necessary to make out his case, or as to the amount of damages which he ought to recover, that he has a right to open and close. We cannot well see at what other stage of the case the evidence of the plaintiff as to the measure of his damages can properly come in. Would the court allow the defendant to give his evidence in support of his answer, and then go back and allow the plaintiff to prove his damages? This would seem not to be the natural and orderly mode of proceeding with the trial.

If this opinion, on this point, differs from the opinion on the same question in *Judah v. The Trustees of the Vincennes University*, 23 Ind. 272, that opinion must be, to that extent, regarded as modified by this.

The judgment is affirmed, with one per cent. damages and costs.

W. March and *W. Brotherton*, for appellant.

C. E. Shipley and *T. M. Browne*, for appellee.

The Commissioners of Morgan Co. v. Holman and Another.

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161	152

THE COMMISSIONERS OF MORGAN COUNTY v. HOLMAN and Another.

PLEADING.—*Abatement.—Another Action Pending.*—In a suit against the board of county commissioners for medical services rendered by the plaintiff to the poor of a certain township upon the employment of the township trustee, an answer setting up the fact that the plaintiff has presented said claim to said board for allowance and has appealed from the decision of the board thereon, and that the appeal is still pending, must show the perfecting of such appeal according to the statute. Such an answer, and also an answer that said claim has been presented by the plaintiff to said board for allowance and is still pending before the board, are answers in abatement, and must be verified by affidavit.

POOR.—Where medical services are rendered by a physician to persons as poor persons of a township in pursuance of an employment by the proper township trustee, such employment, in the absence of fraud or collusion, is conclusive in a suit to enforce the collection of the claim against the county for such services, without regard to the question whether such persons were properly entitled to such services under the poor laws or not.

APPEAL from the Morgan Common Pleas.

DOWNEY, J.—It is alleged by the appellant that the common pleas erred in this case in the following respects: first, in sustaining demurrers to appellant's answer; second, in excluding from the jury evidence offered by the appellant; third, in its instructions to the jury to which appellant excepted; fourth, in refusing instructions asked by the appellant; and, fifth, in refusing to grant a new trial on his application.

The action was brought by the appellees against the appellants to recover for professional services, medical treatment, and medicines, for the poor of the county, alleged to have been rendered at the request and with the approval of the trustees and overseers of the poor in a certain township in the county. The complaint alleges that the claim had been presented to the board, and that they had refused to allow it. An account of the services, &c., rendered was filed with the complaint.

The defendant answered, first, a general denial; second,

that the plaintiffs had filed their claim before the commissioners, and that the same remained pending, until at the term in December, 1868, when the board allowed them ninety dollars, as shown by a copy of the record filed with the answer; that they appealed to the circuit court and gave an appeal bond, which was approved by the auditor; wherefore they say the matter was still pending and undetermined in the circuit court; third, that the persons for whom the services were rendered were not, nor was any of them, entitled to relief under the poor laws, were duly settled in the township, were not without friends or money, of which the plaintiffs had notice; and that the defendant during all the time kept a poor asylum for the accommodation of all poor persons of the county of which the plaintiffs had notice; fourth, that as to the claim for services rendered and articles furnished for one of the persons named, the same was filed for allowance before the commissioners, and which, by continuance, was still pending before them and undecided.

Demurrers were filed and sustained to the second, third, and fourth paragraphs of answer, and the questions reserved by exception.

Thereupon there was a trial by jury; verdict for the plaintiffs; a motion for a new trial, because:

1. The verdict of the jury was contrary to the evidence.
2. The verdict was contrary to law.
3. Error in excluding evidence offered by the defendant as shown by the exception.
4. The refusal of the court to instruct the jury as requested by defendant.

This motion was overruled, and the defendant excepted. Final judgment was then rendered for the plaintiffs, from which the defendant appeals to this court. The evidence is all in the record by bill of exceptions.

The first question is as to the sufficiency of the paragraphs of the answer to which demurrers were sustained. It is decided in *The Board of Comm'rs of Bartholamew Co. v. Ford*,

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27 Ind. 17, that it is not necessary in a case like this for the claimant first to present his claim to the board, but that he may sue on it in the first instance. But the question is made in this case, can the party, when he has elected to go before the commissioners with his claim and submit it for their decision, sue on it while it is pending before the board, or on an appeal from their decision?

But we think the second paragraph does not show that the appeal was perfected by the making out of a transcript, and filing it, with the original papers, in the office of the clerk of the circuit court as required by law. 1 G. & H. 253, secs. 32, 33 and 34. For aught that appears, the claimants, after filing the bond, may have concluded not to perfect the appeal. That part of the answer which says, "wherefore they say that the matters are pending in the circuit court," is not an allegation of fact, but is only the statement of the conclusion of the pleader drawn from the facts previously alleged. But this paragraph and also the fourth paragraph were answers in abatement. They set up, or attempt to set up, the pendency of the claims in the other proceedings in abatement of this action. They should, as such, have been verified. *The Indianapolis, &c., R. R. Co. v. Summers*, 28 Ind. 521.

The third paragraph contains nothing material not in the general denial, and the sustaining of the demurrer to it was not error.

The instructions present the question whether the employment of the physicians to treat the persons mentioned, and to furnish them with medicines, by the proper township trustee, in the absence of fraud or collusion, is conclusive, in a proceeding to enforce the collection of the claim against the county. The common pleas so directed the jury, and we think the instruction was correct.

The court told the jury that the services, &c., must have been rendered in pursuance of an employment by the proper township trustee; and that if they should find that such services or medicines, or any part of them were performed or

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furnished without any prior contract on the part of the trustee, then there could be no recovery for such services. This proposition, coupled with another, was asked by the defendant, as a charge to the jury, and must be conceded to be correct.

The other proposition which was asked by the defendant, coupled with this, was, that it was necessary, in order to enable the plaintiffs to recover, that it should be shown by a preponderance of evidence that the persons, and each of them, to whom they rendered services or furnished articles, were paupers, or persons who were at the time under the poor laws of the State entitled to temporary relief as poor persons, &c.

We think this branch of the instruction was correctly refused. The question as to the necessities of the persons relieved is a matter for the determination of the trustee, and we think if the people call competent and faithful persons to the discharge of the duties of this office, there will be little cause of complaint under this rule. Should there be connivance or fraud between the trustee and the claimant, this, of course, would present a different question.

The evidence which it is alleged was offered by the defendant and improperly excluded by the court, was the order of the board of commissioners allowing ninety dollars of the plaintiffs' claim. There was no error in excluding this. The plaintiffs were not bound by the action of the board in not allowing the full amount of their claim, or in allowing part of it. 1 G. & H. 65, sec. 10. And in addition to this, there was no answer in under which the evidence was admissible.

The new trial was properly refused. The case seems to have been quite well made out by the evidence.

Judgment affirmed, with five per cent. damages and costs.
W. R. Harrison and *W. S. Shirley*, for appellant.

C. F. McNutt, *G. W. Grubbs*, and *W. A. Montgomery*, for appellees.

Baily v. Schrader.

BAILY v. SCHRADER.

JURISDICTION.—*Special Appearance.*—The question whether jurisdiction of the person of the defendant in a civil action has been acquired by the court can be raised in such action, not by an attorney as *amicus curiæ*, but only by a special appearance; and the better practice is to present it by plea in abatement.

SAME.—*Divorce.*—*Custody of Children.*—Where in a suit for a divorce, the court having jurisdiction of the subject matter and of the parties, an order has been made granting the custody of the children of the marriage to one of the parties until the further order of the court; afterwards, in an application to change said order, the court retains its jurisdiction of the subject matter and of the parties, without reference to change of residence.

APPEAL from the Montgomery Common Pleas.

BUSKIRK, J.—The appellant filed in the court below his petition, praying the court to change an order of that court, rendered in a proceeding for a divorce between the parties to this action, in reference to the custody of their children. The substantial facts alleged in the petition are these: that the petitioner was the father, and the defendant was the mother, of Joseph A. and Francis A. Baily, both of whom were minors; that when the said children were born, the petitioner and defendant were husband and wife; that at the June term, 1863, of the Montgomery Common Pleas Court, the defendant obtained a decree of divorce and for the care and custody of the said children until the further order of said court; that said defendant had, subsequent to said divorce, contracted another marriage; that she is no longer a proper and suitable person to have the care and custody of the said children; that she has contracted, by illicit intercourse, the venereal disease, and has become vulgar and profane; that she is cruel in her treatment of said children; and that she is entirely neglecting the moral and intellectual training of the said children. The prayer of the petition was, that the court should modify and change the decree of the court in reference to the care and custody of the said children. Upon the filing of the petition, a summons was issued, which was served upon the defendant in the county of

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128	318
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146	446
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168	359

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Putnam, by the sheriff of said county. We are informed by the record, that John M. Butler, Esq., an attorney of the said court, as a friend of the court, moved to dismiss the writ and petition for the reason that the defendant was a resident of Putnam county, in the said State, and that for that cause the court had no jurisdiction of the person of the defendant or of the subject matter of the said petition, and this motion was sustained, to which ruling the appellant excepted.

The correctness of this ruling is the only question submitted for our decision. There was neither a special nor general appearance made for the defendant. The question of whether the court had acquired jurisdiction of the person of the defendant could only be raised by a special appearance, and the better practice would be to present it by plea in abatement. But we prefer to rest our decision on the merits. The common pleas court of Montgomery had acquired jurisdiction of the persons of the parties, and of the subject matter of the proceeding for a divorce. The court rendered a provisional decree as to the custody of the children, but that decree was binding and conclusive upon the parties as long as it stood. This court held, in *Williams v. Williams*, 13 Ind. 523, that "under the statute, the care and custody of the children of the marriage was a proper question for the court, in decreeing a divorce, to pass upon; and having so done, that adjudication cannot be collaterally inquired into, it is manifest." A party seeking to enforce the decree might rely upon it in any collateral proceeding, but it could not be avoided or set aside in such proceeding. The proper remedy is to apply to the court that made the decree, to change or modify; and we think that the court retained jurisdiction of the parties, without reference to any change of residence, and of the subject matter. We think the application was properly made, and that the court had jurisdiction of the parties and subject matter, and that the court erred in dismissing the petition.

Judgment reversed, with costs, and cause remanded, with directions to the court below to set aside the order dismiss-

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ing the proceeding, and for further proceedings in accordance with this opinion.

S. C. & L. B. Willson, for appellant.

J. M. Butler, for appellee.



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142	101
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153	535
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HOLMES and Another v. BYBEE and Another.

MORTGAGE.—*Foreclosure.*—*Judgment Lien.*—*Redemption.*—*Act of 1861.*—Where a mortgage on real estate is foreclosed, and the property is sold under the decree, there being, at the commencement of the suit, a judgment lien on said real estate junior to said mortgage, and the judgment creditor not being a party to the foreclosure suit, his rights are not affected by the foreclosure and sale, and the provisions of the redemption law of June 4th, 1861 (2 G. & H. 251), do not apply to him or affect him as to such sale; an execution issued on said judgment before the expiration of the statutory lien of the same, and after the expiration of one year from said sale, the property not having been redeemed, and a deed therefore having been executed by the sheriff to the purchaser, may be levied upon said real estate, and the same may be sold thereunder, subject to said mortgage as if it had not been foreclosed.

SAME.—*Junior Mortgage.*—Under circumstances similar to these, the rights of a junior mortgage creditor would be essentially the same as those of a junior judgment creditor.

STATUTE CONSTRUED.—*Redemption Law of 1861.*—The redemption law of June 4th, 1861 (2 G. & H. 251), does not cut off or affect any right of redemption existing by the general principles of law and held by one not a party to the judgment, decree, or other judicial proceeding on which a sale of real estate has been made.

APPEAL from the Kosciusko Circuit Court.

WORDEN, J.—Complaint by the appellees against the appellants, to enjoin the sale of certain real estate on execution.

Demurrer to the complaint overruled, and exception.

Final judgment for the plaintiffs below.

The following are the facts stated in the complaint. On the 8th of July, 1866, Jacob Bybee, then the owner of the

land mentioned in the complaint and lying in said county of Kosciusko, executed a mortgage thereon to Washington Bybee, one of the appellees, to secure the payment of the sum of five thousand two hundred and ninety-three dollars and thirty-six cents. On the 2d day of November, 1866, Washington Bybee commenced a suit in the Kosciusko Circuit Court, to foreclose said mortgage, and at the May term of said court, 1867, he obtained a decree of foreclosure. An execution was issued upon the decree, and the premises were sold by virtue thereof, on the 15th of June, 1867, the said Washington becoming the purchaser, at the sum of five thousand seven hundred and fifty dollars. At the expiration of a year from the time of the sale, the property not having been redeemed, a deed was executed by the sheriff for the premises, to said Washington Bybee, who afterwards conveyed a portion of the premises to the other appellee, George W. Harlan.

At the September term of the Kosciusko Circuit Court, 1866, the appellants, Holmes and Pfeifer, recovered a judgment in that court against Jacob Bybee, for the sum of thirteen hundred and eighty-one dollars and seventy cents, and in November, 1868, caused an execution to be issued thereon and levied upon the property thus mortgaged and sold under the decree. The complaint seeks to enjoin the sale under the execution, as it would cast a cloud upon the plaintiffs' title. Holmes and Pfeifer were not made parties to the foreclosure suit, and the only question presented is, whether, on the facts stated, the sale was properly enjoined.

The question naturally suggests itself, what is there in the facts stated, that precludes Holmes and Pfeifer from levying their execution upon the land in question, and selling it, subject, however, to whatever rights Washington Bybee acquired by his purchase?

We will consider the case, first, without any reference to the redemption law of June 4th, 1861, and then determine how that act affects it, if at all.

The judgment of the appellants was a lien on the land for

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the space of ten years from the time it was rendered. 2 G. & H. 264, sec. 527. An equity of redemption may be levied upon and sold on execution. *Id.* 263, sec. 526. Lands levied on may be sold subject to liens and incumbrances. *Id.* 244, sec. 452.

There can be no doubt that, if Washington Bybee's mortgage had not been foreclosed, and the land sold, Holmes and Pfeifer might have levied their execution upon the land and have sold it, subject, of course, to the mortgage.

Are their rights changed by the foreclosure? It has been held in two cases, at least, in this court, that the rights of a junior mortgagee are in no way affected by the foreclosure of a senior mortgage, where the junior mortgagee was not made a party to the proceedings. *Proctor v. Baker*, 15 Ind. 178; *Murdock v. Ford*, 17 Ind. 52. We have no doubt of the soundness of this doctrine. It is argued, however, that the doctrine is not applied to a junior judgment creditor, because his is a general lien on all the defendant's real estate in the county, and not a specific lien upon any particular property. A judgment creditor has a lien as absolute on all the real estate of the defendant in the county as the mortgage creditor has upon the particular property mortgaged; and no good reason has been given why he should not be made a party to a bill to foreclose a prior mortgage, as well as a junior mortgagee. We think a junior judgment creditor and a junior mortgage creditor stand, in this respect, upon essentially the same ground.

And this is in accordance with the authorities. Says Chancellor KENT, "When the mortgagee proceeds by bill to foreclose, he must make all incumbrancers, existing at the filing of the bill (and which, of course, includes the junior, as well as the prior incumbrancers) parties, in order to prevent a multiplicity of suits, and that the proceeds of the mortgaged estate may be duly distributed; and the incumbrancers who are not parties will not be bound by the decree. The reason of the rule requiring all the incumbrancers, subsequent as well as prior to the plaintiff, to be made parties, is to give

security and stability to the purchaser's title; for he takes a title only as against the parties to the suit, and it cannot and ought not to be set up against the subsisting equity of those incumbrancers who are not parties." 4 Kent Com. (11th ed.) 210, 211. See, also, *Brainard v. Cooper*, 10 N. Y. 356, and authorities there cited. Indeed, it may be stated, as a principle of universal jurisprudence, that no person is bound by the proceedings or judgment of any court to which he is not a party. We have seen, by the statement of the case, that the appellants' judgment was rendered before the commencement of the foreclosure suit. Had their judgment been rendered after the commencement of that suit, they might have been deemed incumbrancers *pendente lite*, and bound by the judgment. *Harlock v. Barnhizer*, 30 Ind. 370. But as their lien accrued before the foreclosure suit was commenced, and as they were not parties thereto, the mortgage stands, as to them, precisely as if it had not been foreclosed, and as if there had been no sale made under the foreclosure. It is urged by counsel for the appellees, that the appellants, if not barred entirely, were bound to redeem the property before they could sell upon their execution. This argument would be worthy of consideration, if, as to the appellants, there had been any foreclosure and sale; but as there has not, they have the plain statutory right of levying upon and selling the equity of redemption. Again, the question is put by way of argument, what will the appellants sell if they proceed with their execution, inasmuch as the equity of redemption has already been sold? This question assumes that, as against the appellants, the equity of redemption has been sold, while we think, quite clearly, it has not. As against Jacob Bybee, the mortgagor, who, we suppose, was a party, the equity of redemption has been sold undoubtedly; but it does not therefore follow, that as against the appellants it has been sold, any more than it would follow, if the appellants had been made parties, and the mortgagor had not, that the equity of redemption would have been sold as against the mortgagor.

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Had Jacob Bybee not been made a party, no one would contend that his equity of redemption would have been divested by the proceedings. As against Jacob Bybee, the appellees have the title; but as against the appellants, they have nothing but the mortgage.

We are of opinion that unless the case is affected by the redemption law before mentioned, the appellants have the right to levy their execution upon the land in question, and sell the same, subject, of course, to the mortgage, in the same manner as if the mortgage had not been foreclosed. The statute in question we have set out in full, for convenience of future reference. It is found in 2 G. & H. 251.

"An act providing for the redemption of real property, or any interest therein, sold on execution or order of sale, and providing for the issuing of certificates of purchase in such cases, and for the execution of conveyances, and repealing all laws in conflict therewith. (Approved June 4, 1861.)

"Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever, hereafter, any real property or any interest therein shall be sold on any execution or order of sale issued upon any judgment, decree or other judicial proceeding within this State, the owner thereof, his heirs, executors, administrators, or any mortgagee or judgment creditor having a lien upon the same may redeem such real property or interest therein, at any time within one year from the date of such sale by paying to the purchaser, his heirs or assigns, or the clerk of the court from which such execution or order of sale was issued for the use of said purchaser, his heirs or assigns, the purchase-money, with interest thereon at the rate of ten per cent. per annum.

"SEC. 2. Upon payment of the purchase-money, the sheriff or other officer making such sale shall issue to the purchaser a certificate, showing the court in which the judgment or decree was rendered, the parties to the action, the date of the sale, the name of the purchaser, the amount of the purchase-money, and a description of the premises sold, which certificate shall entitle the holder thereof to a deed of con-

veyance, to be executed by the officer making the sale at the expiration of one year from the date of such sale, if the property shall not have been previously redeemed. The judgment debtor shall be entitled to the possession of the premises for one year after the sale, and in case they are not redeemed at the end of the year as provided in this act, he shall be liable to the purchaser for their reasonable rents and profits.

"Sec. 3. When any mortgagee or judgment creditor shall redeem any real property or interest therein under the provisions of this act, such mortgagee or judgment creditor shall retain a lein on the premises for the amount of money so paid for redemption against the owner and any junior incumbrancer.

"Sec. 4. All laws and parts of laws coming in conflict with any of the provisions of this act, be and the same are hereby repealed; and, whereas, an emergency exists for the immediate taking effect of this act, therefore the same shall take effect and be in force from and after its passage."

This statute confers a new right upon the owner of the property sold, his heirs, executors, or administrators; inasmuch as before the passage thereof no right of redemption existed as to them, unless it was conferred by section four hundred and fifty-two of the code, above cited, a point that need not now be decided. It also confers upon "any mortgagee or judgment creditor having a lien upon" the property sold, the right to redeem within the year on the terms provided for.

Upon an examination of the provisions of this statute, we are of opinion that it does not cut off or affect any right of redemption existing by the general principles of law, and held by one who was not a party to the "judgment, decree, or other judicial proceeding" on which the sale was made. There is nothing in the terms of the statute that requires such construction; and on general principles, a statute will not be so construed as to deprive a party of his "day in court," unless its terms imperatively demand such construc-

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tion, admitting the power of the legislature to pass such statute. There is no more reason for concluding an incumbrancer by a proceeding to which he is not a party than there would be in concluding the owner of the equity of redemption by such a proceeding. If a mortgage were to be foreclosed without making the owner of the equity of redemption a party, the proceeding, as to him, would be a nullity; and he could redeem the mortgage after the expiration of the year, and at any time before being barred in some other way; and the reason applies as strongly to him who has a lien upon the equity of redemption as to him who is the owner thereof.

The statute can have full force without such construction. Where there are successive judgments, without mortgage, and the property is sold on the junior, the holder of the senior judgment need not redeem at all, for such sale in no way impairs the prior lien of the senior judgment; but if the property is sold on the senior judgment, then the holder of the junior judgment may redeem as provided for.

Again, suppose there are three judgments, and a sale is made on the intermediate one; such sale would not affect the lien of the oldest judgment, on which the land might be again sold at any time before the expiration of the lien, but the holder of the youngest judgment might redeem under the statute; but having done so, he acquires no right that would affect the lien of the oldest judgment. By his redemption he acquires a lien only against the owner and "any junior incumbrancer."

In case of a sale on several executions, in the hands of the sheriff at the time of the sale, issued upon judgments which are liens upon the property sold, it may be doubtful whether either one of the judgment creditors could redeem, inasmuch as the proceeds of the sale would have to be paid in the order of the priority of the liens, and the sale might be said to be made upon one execution as much as another. This point, however, we do not decide.

In case of a sale on foreclosure of a mortgage, where

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prior or subsequent incumbrancers, by judgment or mortgage, are made parties, and set up their respective claims, and procure an order for the payment of the proceeds of the sale to the respective parties according to their priorities, it may be doubtful whether any of them could redeem, because they would, in some sense, be redeeming their own sales. This point is not decided, but simply suggested.

Finally, in case of a sale on foreclosure, where subsequent incumbrancers, by judgment or mortgage (and possibly prior ones), are made parties, but fail to set up their claims and procure the order for payment according to priorities; such incumbrancers, we think, come within the letter and spirit of the statute, and may redeem according to its terms, and not otherwise. They have had their day in court; the proceedings against them, therefore, are valid, and they may have such redemption as the statutes provides, and none other.

There may be other cases put, where redemption could be had under the statute. It has not been so much our design, in this opinion, to anticipate cases, or enumerate all the instances in which redemption may be had under the statute, as to show that it may have full effect without so applying it as to cut off the right of redemption without notice or warning to the party interested.

The statute in question ought not, in our opinion, to be construed as a general limitation law, cutting off all rights of redemption after the expiration of a year from the sale. Statutes may well limit the time within which an action shall be brought, or a right asserted, after it accrues, because the party having the cause of action or the right knows, or is supposed to know, when it accrued; and, consequently, he knows when the statute begins to run, and when he will be barred. Under our statute, if a party liable to an action conceal the fact from the knowledge of the party entitled thereto, the statute does not begin to run against the latter until he makes the discovery.

If the statute under consideration were to be construed as

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a general limitation law, and operating against all persons, whether parties or not, then the anomaly would be presented of a person being barred of a right, by limitation, without any knowledge whatever of the happening of the event that put the statute in operation against him. Before he has any knowledge that any statute of limitation is running against him, it has run its course, and he finds his right cut off.

The intention to work such results cannot be fairly imputed to the legislature in the passage of the law in question.

In the case before us, the appellants not having been made parties to the foreclosure suit, and being, for that reason, in no manner bound by the judgment in the cause, and the equity of redemption, as to them, being still in Jacob Bybee, they may sell said equity of redemption on their execution, and the purchaser may, of course, redeem the mortgage.

The demurrer to the complaint should have been sustained.

The judgment below is reversed, with costs, and the cause is remanded, with instructions to the court below to proceed in accordance with this opinion.

PETTIT, C. J., (dissenting).—If A. has a mortgage on the lands of B., and afterwards C. obtains a judgment at law against B. and rests without execution till A. forecloses his mortgage, and has the land sold on the decree, and becomes the purchaser, taking the sheriff's certificate for a deed at the end of one year, unless sooner redeemed; and the year expires without redemption, and the deed is made, and afterwards C. takes out an execution on his judgment, has it levied on the land, and is about to sell it; can A. enjoin C. and the sheriff from making the sale? This is the only question in this case. It is known and conceded by the bench and bar, not only in this State, but in our sister states and in England, as an almost, if not quite, universal rule at common law, and by statute in this State till June 4th, 1861, that an injunction in such case would not be granted, and that the execution plaintiff might proceed to sell the land.

On this point the cases are too numerous, and the doc-

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trine too universal, uniform, and well settled, to require or justify citation of authority. But I am to enquire what is the effect of our statute of June 4th, 1861, on this subject, recited in the opinion of my brethren.

The argument of counsel on both sides, in their briefs, has been able and exhaustive of the subject, and of all collateral questions connected with it, exhibiting great research and learning; but I do not deem it my duty, nor is it necessary for a proper solution of the question, that I should critically examine the authorities cited as to what the law *was* as to the right of incumbrancers in such a case; but it is my duty to say what the law *is* on the subject; and I do not think there is room for serious doubt as to it. I have stated what the law was before the act of June 4th, 1861, and I have to add that it was competent for the legislature to make a new limitation within which incumbrancers in such cases should assert their rights, provided a reasonable time was given, and I think a year was not an unreasonable time; and it was equally competent and within the law-making power and department of the state government, to repeal the common law and former statute law, and make an entirely new one on the subject. This the legislature has done in so clear and unambiguous a manner, that I think I do not mistake its meaning. The incumbrancer had one year after the sale of the land to redeem in, and no more, and having failed to do so in the mode prescribed, his remedy is gone. There is no use of discussing the former difference between law and equity with us, for our system is all law and all equity—all equity and all law.

The judgment and decree of the court below ought, in my judgment, to be affirmed.

L. M. Ninde and *R. S. Taylor*, for appellants.

G. W. Frazier and *D. D. Pratt*, for appellees.

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JAMES v. HAYS and Others.

VENDOR AND PURCHASER.—*Conveyance Without Warranty.—Title.*—A purchaser of real estate took a quitclaim deed therefor, with notice of a defect in the title, consisting of a misdescription of the land in prior conveyances thereof, and, there being no fraud in the transaction, the vendor, by a separate writing, promised and guaranteed that he would cause said defect to be rectified, without specifying any time within which it should be corrected; whereupon, at the request of the vendor, the vendee executed his promissory note to a third person for the purchase-money.

Held, in a suit on said note, it not appearing that said purchaser had been evicted or had sustained any damage, that the continued existence of said defect constituted no bar to the action, or ground for enjoining its prosecution.

APPEAL from the Warren Common Pleas.

BUSKIRK, J.—This action was brought by the appellees against the appellant, upon a note by him executed to Henry C. Dawson, and by Dawson assigned to the appellees.

The appellant answered in three paragraphs. The first was, that the note sued on was executed without any consideration. The second paragraph of the answer contained substantially these facts: that the only consideration for the note sued on was this: that Elijah Dawson claimed to be the owner of a certain portion of ground (which is specifically described); that the said Elijah Dawson claimed that one John Little had bought the same at sheriff's sale, that Little had conveyed it to him, and that he, the said Dawson, was to convey the same to the defendant by a quitclaim deed; that the said Dawson claimed that in the deeds from the sheriff to Little and from Little to him there was a misdescription of the said tract of land; that the said Elijah Dawson agreed in writing (a copy of which was filed with, and constituted a part of, the answer) to have said John Little to correct the said deeds, and guaranteed that Little would make such correction; that the said Elijah Dawson further agreed in the said writing that he would correct the deed made to the defendant, when the said Little had corrected the other deeds; that the defendant, thereupon, executed the note sued on, in consideration of getting the title to the said

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tract of land and having the said deeds corrected; that the said note was made payable to Henry C. Dawson, at the request of Elijah Dawson; that Little refuses to correct either the deed from the sheriff to him, or the one from him to Elijah Dawson; that, in fact, there is nothing to correct, for the reason that the sheriff never levied on and sold said parcel of ground to John Little; that the said Little took no title to the same by the deed from the sheriff, and could not and did not convey any to the said Dawson; that the said Dawson had acquired no title from the conveyance made to him by Little; and that by reason of these facts the consideration had wholly failed.

The agreement and guarantee referred to in the above answer was in these words :

"STATE OF INDIANA, WARREN COUNTY,
June 5th, 1867.

"This will certify that I have this day deeded to David James, by quitclaim deed, the south-west part of outlot No. two, in the town of Independence, facing on and being in the north-east corner of Liberty and Second streets, more fully known as the Thomas Inlain store-house and lot, and there appearing to be a mistake in a former deed from sheriff Jones to John Little, and from Little to me, I hereby agree to rectify my deed, after having John Little to rectify and more fully describe said lots. I further guarantee that he, John Little, will so rectify said deed as above described.

"ELIJAH DAWSON."

The third paragraph contained, in substance, the same allegations as the second. It was sworn to, and prayed the court to stay all proceedings in the action on the note, until Elijah Dawson should cause the said mistakes in the said deeds to be corrected. The appellees demurred to the second and third paragraphs of the answer. The court sustained the demurrer to each paragraph of the answer, and the appellant excepted. There was an issue formed on the first paragraph of the answer. The cause was, by the agreement of the par-

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ties, tried by the court. There was a finding and judgment for the appellees. There was no motion for a new trial. The evidence is not in the record. The only error assigned is the sustaining the demurrer to the second and third paragraphs of the answer.

Do the facts stated in the second paragraph of the answer constitute a good defense to the note? The appellant insists that they show a total failure of consideration. We do not think so. The answer contains no allegation of fraud or any unfairness or misrepresentation. The appellant purchased with full notice of all the facts. He was fully informed how Dawson derived his title, and that there was a misdescription in the deeds. There is no allegation that he has been evicted, or that he has sustained any damage. With full notice of all these facts, he consented to take a quitclaim deed. He failed to protect himself by the covenants contained in a warranty deed. Can he, under such circumstances, plead a failure or want of title in bar of an action for the purchase-money? This court, in the case of *Laughery v. McLean*, 14 Ind. 106, say, "For aught that appears, the conveyance was a mere quitclaim, without any warranty whatever; and in such a case, in the absence of fraud, a want or failure of title cannot be set up in bar of the action for the purchase-money."

The Supreme Court of Connecticut, in the case of *Barkhamsted v. Case*, 5 Conn. 528, say, "If there was no fraud, and no covenants to secure the title, the purchaser has no remedy for his money, even on failure of title, either at law or in equity. *Abbott v. Allen*, 2 Johns. Ch. 519; *Chesterman v. Gardner*, 5 Id. 29. The grantee of land, if he takes no covenants, and there is no fraud in the sale, has assumed on himself the risk of title; and any security given by him for the purchase-money is on a legal consideration."

The appellant has pressed upon the consideration of the court the case of *Murphy v. Jones*, 7 Ind. 529, and has earnestly insisted that the principle there decided conclusively demonstrates that the court erred in sustaining the demurrer to the second paragraph of the answer. The facts in that

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case were these: Mrs. Jones represented that her father, William Murphy, had died intestate, in the state of Ohio, seized of certain real estate, that she was one of his heirs and entitled to one-ninth part thereof. The defendants purchased her interest in said estate, and took from her and her husband a quitclaim deed, and executed their note for three hundred dollars. The grantees were in the possession of the land at the date of the deed. Suit was brought on the note. The defendants admitted the execution of the note, that William Murphy died seized of the land, and that Mrs. Jones was one of his children, but avered that she took by inheritance no interest in the estate of her father, for the reason that he had devised his land by will to other persons and had expressly provided that she should take no interest in his lands. This court say, "Some consideration is necessary to uphold a contract. If there be any, the law will not enquire whether it is adequate or not. But when a promise is alleged to have been made in consideration of the release of any interest, if it appears that the promisee had in fact no interest which passed by the release, there will be no consideration for the promise alleged."

In that case, the purchase was made in the belief that Mrs. Jones had an actual interest in her father's estate, when, in fact, she had no interest whatever. It is to be presumed that this court came to the conclusion that the representations made by Mrs. Jones were false and fraudulent, and amounted in law to a fraud. The decision cannot be supported on any other theory. If the court intended to hold, and did hold, that a want or failure of title, in the absence of fraud, where there was no warranty whatever, was a bar to an action upon a note given for the purchase-money, then the case was overruled by the decision of this court in the case of *Laughery v. McLean*, *supra*, where a directly opposite doctrine was announced. But that case is clearly distinguishable from the one under consideration. In that case, there were false representations, the grantor had no interest whatever, the grantees were not placed in possession, and

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acquired no title, no interest, or benefit. In the case under consideration, there were no false or fraudulent representations; the appellant purchased with full notice of the misdescription in the deeds, took the possession, and still retains it. The grantor had at least an equitable interest in the premises sold, which might mature into a legal title.

But it is claimed by the appellant, that the agreement and guarantee of Elijah Dawson to have the mistake corrected ought to bar this action. We do not think so, but, on the contrary, are of the opinion that such agreement deprives the appellant of any defense to this action. As has been shown, the appellant purchased with notice of the defective title, waived all covenants, executed his note to a third party, and took the personal obligation of Elijah Dawson to have the mistake corrected. The note was payable two months after date. The agreement does not specify any time in which the mistake was to be corrected. The correction of the mistake did not constitute a condition precedent to the payment of the note; and if the agreement had so provided, we cannot see how it could affect the rights of Henry C. Dawson, the payee, as it is neither alleged nor proved that he had any knowledge of the defective title or the execution of the guarantee and agreement by Elijah Dawson. The giving of the note to a third party and the taking of the obligation of the vendor was a waiver and abandonment of any defense to the note on account of the defective title. If he has any remedy, it is upon the guarantee of Elijah Dawson. The court committed no error in sustaining the demurrer to the second paragraph of the answer.

But if the court had erred in sustaining the demurrer, we would not for that reason reverse the case. Every fact alleged in the second paragraph of the answer could have been proved under the first paragraph of the answer, alleging an entire want of consideration. This court, in the case of *Laughery v. McLean*, *supra*, say, "It is not the practice of this court to reverse a judgment, otherwise correct, for an error in sustaining a demurrer to a plea, or paragraph in the

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answer, if, as in this case, there is another issue upon the record under which the same evidence would be admissible."

Having reached the conclusion that there was no valid defense, it necessarily results that the court committed no error in sustaining the demurrer to the amended third paragraph. The court would have no right to stay the proceedings unless there was some valid defense.

Judgment affirmed, with costs.

• *J. H. Brown*, for appellant.

M. M. Milford, for appellees.

BURNTRAGER v. McDONALD.

BILL OF EXCEPTIONS.—*Dismissing Appeal.*—A ruling of the circuit court dismissing an appeal to that court from the decision of the board of county commissioners in a proceeding to change the location of a public highway cannot be presented to the Supreme Court except by a bill of exceptions.

APPEAL from the Carroll Circuit Court.

DOWNEY, J.—This was a proceeding, by petition, before the board of county commissioners, by McDonald, to change the location of a public highway on his lands.

Burntrager became a party by first objecting to the appointment of viewers, and secondly, by remonstrating. The result before the commissioners was favorable to McDonald. Burntrager appealed to the circuit court, where he moved to dismiss the case, and McDonald moved to dismiss the appeal. Both of these motions were overruled by the court.

Then the county commissioners, who for some reason were named as defendants on the docket, moved the court to dismiss the case so far as they were concerned. Then McDonald, in writing, moved the court to dismiss the appeal. Then, Burntrager, on his motion, obtained an order on the auditor to certify up a complete transcript, and to file the

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original papers in the cause, some of which seem not to have been sent up by him.

Then this order was made by the court: "The court being duly advised, do now order that the appeal taken herein be and the same is hereby dismissed; and to which ruling of the court said plaintiff excepts, and prays an appeal," &c.

There is no bill of exceptions in the record, nor does it appear that the point was reserved in any way except as above stated.

The appellee urges that the propriety of the ruling of the court is not before us without a bill of exceptions.

On the other hand, the appellant insists that the exception to the ruling of the court in sustaining the written motion of the appellee to dismiss the appeal was entered of record, and that the question is fairly presented without a bill of exceptions; that all proper entries made by the clerk are to be deemed parts of the record.

If it were true that the sustaining of a written motion, and an exception, would put the question on the record in such form as to save the point, still this would not avail the appellant, for the reason that it does not appear that the court sustained the written motion, or that the appeal was dismissed for the reason stated in that motion.

But we think the position of the appellant cannot be sustained.

It is useless to refer to many of the cases on this subject. In *Aspinwall v. The Board of Commissioners of Knox Co.*, 18 Ind. 372, this court say, "There should have been a bill of exceptions, showing the cause of the dismissal, otherwise the action of the court will be presumed to have been correct." See, also, *Conoway v. Weaver*, 1 Ind. 263.

The judgment is affirmed, with costs.

L. B. Sims and *J. H. Gould*, for appellant.

J. Applegate, for appellee.

Ritenour v. Mathews.

RITENOUR v. MATHEWS.

CONTRACT.—*Proposition not Accepted.*—A mere proposition made by a defendant-surety in a judgment to the judgment-plaintiff, while the judgment is in full force, that if the latter will accept other sureties from the principal defendant, and release or enter satisfaction of the judgment so as to discharge said defendant-surety therefrom, he will surrender to the principal defendant a promissory note which he holds against said principal defendant, does not constitute a contract, notwithstanding the judgment-plaintiff should afterwards perform the things so to be done by him, unless said judgment-plaintiff agrees with said defendant-surety to accept such other sureties from said principal defendant, or gives said defendant-surety notice that he will act upon said proposition.

APPEAL from the Tippecanoe Common Pleas.

DOWNEY, J.—This action was brought by the appellant against the appellee on two promissory notes executed by the latter to the former.

The defendant answered in several paragraphs, but, by agreement, only the third and sixth are set out in the record.

The third is as follows: That the defendant is entitled to have a surrender and full cancellation of the notes on which the suit is brought, because that in April, 1862, one Jones recovered judgment in the Warren Circuit Court against the defendant, said plaintiff, and one William Ritenour, on one or more promissory notes executed to Jones by Mathews, as principal, and Anthony and William Ritenour, as sureties for Mathews; that the judgment was for \$1,969.20 and costs, that before and at the time said judgment was rendered, Mathews was in insolvent and embarrassed circumstances, and unable to pay his debts, and said sureties were in great danger of having to pay said debt; that the plaintiff owned a large body of land, on which the judgment was a lien, and was extremely anxious to be released from his liability on account of said suretyship, and to that end agreed with Jones that if Jones would accept such other sureties as defendant could procure, and release the plaintiff from the judgment, he would give up the notes on which this suit is brought to the defendant as satisfied; that in pursuance of said agreement with Jones, the defendant did procure other

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securities which Jones accepted, and Jones went to the town of Williamsport, ten miles, and entered satisfaction of the judgment against the plaintiff, as he had agreed to do; wherefore the defendant says that inasmuch as the agreement of Jones was for the benefit of the said defendant, he is entitled to have the benefit thereof, though the consideration for the plaintiff's promise passed from Jones. Prayer, that the plaintiff be compelled to surrender up the notes, &c.

The sixth paragraph is as follows: That Jones had recovered judgment as above stated; that the plaintiff agreed with Judy and Keys that if they would become sureties for the defendant to Jones for the amount of the judgment, whereby Jones would release plaintiff, he would cancel and surrender the notes on which this suit is brought to the defendant; that Judy and Keys accepted the offer of plaintiff, became sureties for Mathews to Jones in a note for the amount of the judgment, and Jones thereupon entered a release and satisfaction for the judgment against the plaintiff, the defendant, and William Ritenour, which agreement was made and entered into for the benefit of said Mathews; wherefore the defendant says he is entitled to have said notes surrendered, &c. See 31 Ind. 31.

There was a general traverse of these paragraphs of the answer.

Upon the issues thus formed, there was a trial by jury, and a general verdict for the defendant, accompanied by answers to interrogatories which had been submitted to the jury.

There was a motion by the plaintiff for a new trial for the following reasons: first, the court erred in refusing to give instruction number two asked by the plaintiff; second, in requiring the jury to answer interrogatories 1, 2, 3, 4, 5, and 6, asked by the defendant; third, the general verdict and answers to interrogatories are unsupported by the evidence; fourth, are contrary to law; fifth, the court erred in admitting the evidence of the defendant over the plaintiff's objection, to prove the alleged contract for the surrender of the notes;

sixth, the general verdict is not sustained by sufficient evidence.

This motion was overruled, and final judgment was rendered. The evidence and instructions of the court are set out in a bill of exceptions contained in the record.

The facts of this case, as disclosed by the answers, which we have set out, leave an unfavorable impression upon the mind. The plaintiff had become the security of the defendant to Jones. Jones had obtained a judgment on the notes against the principal and the sureties. It was the duty of the defendant, if he would be considered an honorable, or even an honest man, to make every reasonable effort in his power to shield his security from the payment of the debt. He had no right, legally or morally, by failing to discharge the debt, and thus allowing the security, whom he should have protected, to become alarmed for his safety, to speculate upon his fears and his necessities. He did obtain other securities, and thus relieve the plaintiff from liability, and he now seeks to have the notes involved in this case satisfied because he did that which he was in every sense, as an honorable and an honest man, bound to do without any recompense therefor.

But we will see how the case results. The evidence was as follows :

An agreement of the parties that the third and sixth paragraphs of the answer are true, except the alleged agreement between the plaintiff and Jones in the third paragraph, and the alleged agreement between the plaintiff and Judy and Keys in the sixth paragraph.

Jones testified that he held the judgment referred to, which he released on Mathews giving him Judy and Keys as security. Shortly after the judgment was rendered, the plaintiff in this case came to him and wanted an execution issued on it, which was done, which was afterwards returned unsatisfied at his instance, after finding that Mathews had no property, and that it had to come out of him. The plaintiff saw him several times after the judgment was rendered, and told

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him that if Mathews would have him released by giving other securities that he would accept, he would surrender to Mathews some notes which he held on him, amounting to about six hundred dollars. He stated this several times, *but there was no contract made between plaintiff and him*. The judgment stood some two or three years. Judy came to him and asked him if he would not take other sureties and release the judgment. He said he would. Afterwards, Mathews made a note, and Judy and Keys signed it, for the amount of the judgment, which he then entered satisfied. It was agreed between Mathews and him that when he had satisfied the judgment, he was to get Smith, the clerk of the court, to write to Mathews that it was done, that he might show the letter to the plaintiff and get up his notes. He satisfied the judgment, and Smith wrote the letter informing Mathews of the fact.

James Mathews, the defendant, stated, that Jones held a note on him as principal, with plaintiff and his brother as securities, for something over nineteen hundred dollars. He was embarrassed and unable to pay his debts, and Jones put the note in judgment. The plaintiff in this suit held the notes now in controversy in this suit against him. He became uneasy about the judgment shortly after it was rendered, and wanted to be released. He proposed that if he, defendant, would give other securities to Jones and have the judgment satisfied, he would surrender the notes in suit to him. He told him he would do it. Jones came to see him about it, and said if he would get other good securities he would release the judgment, and the plaintiff would give up the notes to him. He then saw Judy and Keys and told them what the plaintiff would do, and that he could make about six hundred dollars by giving a note with surety that Jones would accept and having him release the judgment. They said they would go security on the note to Jones to get the notes surrendered to him. He afterwards saw plaintiff, and told him that Judy and Keys had agreed to go security, and asked him if he would still do as he had said, and he said he would—to get the docket receipted and send him the receipt. Judy

and Keys did go on the note, and he got the receipt of the judgment, and took it to Ritenour. He saw the plaintiff afterwards, and he wanted him to divide it with him. He said it looked pretty hard. He said to the plaintiff, that he did not think it was hard to do as a man agreed to do. At the time the judgment was released he was not able to pay his debts. He was handling cattle, bought with the money and in the name of others, getting pay for feed and a share of the profits.

Judy.—Had no conversation with the plaintiff with reference to the agreement. If he had not supposed that he was helping Mathews to that extent, he would not have gone on the note to Jones.

Keys.—Mathews came to him shortly before the judgment was released, and told him what the plaintiff proposed. He had no communication with the plaintiff on the subject. Went security with the faith that Mathews would make the six hundred dollars, or he never would have done it.

William Ritenour.—Was surety with the plaintiff for Mathews in the note and judgment to Jones. The plaintiff told him several times that he would give up the notes if Mathews would get him released from the judgment. Went to see Mathews and told him about it, at the request of the plaintiff.

This was the evidence on the part of the defendant.

Ritenour, the plaintiff, testifies, he never entered into any agreement with Jones, or with Judy and Keys, that he would surrender the notes in controversy. He told Mathews that he would give up the notes, if he would get him released from the Jones judgment. Told him this several times. He told Jones what he had said to Mathews. Jones never agreed with me that he would release the judgment. The last talk with Jones was six months before the judgment was released. Mathews' condition, financially, was better than when the judgment was rendered. He had at least one hundred and fifty large cattle in his possession, feeding, worth at least fifty dollars per head, when the judgment was released. It was

understood that he was "wiggling" out of his difficulties. The last time he talked with Mathews about the judgment and surrender of the notes was some months before the release of the judgment. This was all the evidence.

It is alleged in the assignment of errors, that the court erred in refusing to grant a new trial on the motion of the plaintiff, and all the points made are embraced in that assignment.

The first reason stated for granting a new trial was, that the court had erred in refusing to give instruction number two asked by the plaintiff. That instruction was as follows: "The mere proposition of the plaintiff to Jones, while his judgment was in full force, that if he would accept other sureties from Mathews and release or enter satisfaction of the judgment so as to discharge the plaintiff from the same, he, the plaintiff, would surrender the notes in this suit to Mathews, would not make a contract unless Jones agreed with the plaintiff that he would accept such other sureties from Mathews, or gave the plaintiff notice that he was going to act upon the plaintiff's proposition."

In view of the testimony of Jones, that "there was no contract made between plaintiff and him," this charge should have been given to the jury. A mere proposition, not in any way accepted, does not make a contract. This is a familiar principle in the law of contracts, and needs no authorities for its support.

The next question is with reference to the action of the court in submitting the interrogatories to the jury. As to this we are in doubt whether the question is well presented by the record or not. There was an objection, but no exception at the time.

The next point made relates to an objection to the reception of the testimony of the defendant, in proof of an agreement between *himself* and the plaintiff.

This evidence was wrongly admitted. In the third paragraph the agreement was alleged to have been made with Jones; and in the sixth paragraph it was alleged to have been

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made with Judy and Keys. It did not tend to support either paragraph of the answer.

The next point made is as to the sufficiency of the evidence to sustain the verdict of the jury. We think the evidence fails to sustain the third or the sixth paragraph of the answer. There was no contract proved, either between the plaintiff and Jones or between him and Judy and Keys.

The judgment is reversed, with costs; and the cause is remanded, with directions to set aside the verdict and grant a new trial.

J. McCabe, for appellant.

W. C. Wilson and *J. H. Brown*, for appellee.

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HIGHWAY.—Proceeding to Establish.—Appeal.—In a proceeding to establish a highway, an order of the board of county-commissioners refusing to pay out of the county treasury the damages assessed by viewers to one through whose land the road would run, is a sufficiently final decision to authorize an appeal to the circuit court by the petitioners for the establishment of the highway. On such appeal the entire proceeding goes to the appellate court, which has full power to make a final disposition thereof; and if the appeal by said petitioners be taken in term, all the adverse parties before the commissioners must take notice of the appeal, and the omission of the name of one of the appellees in the title of the cause in the docket of the appellate court is unimportant.

APPEAL from the Hendricks Circuit Court.

WORDEN, J.—Complaint by the appellee against the appellants for an injunction. Demurrer to the complaint overruled and exception. Final judgment for the plaintiff below.

The object of the suit was to enjoin the defendants, who were supervisors, from opening a new highway through the land of the plaintiff, on the alleged ground that the proceedings to establish the highway were void as to the plaintiff.

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Transcripts of the proceedings of the board of commissioners and of the circuit court on appeal from the commissioners are set out as exhibits, to show the invalidity of the order of the circuit court laying out and establishing the highway.

It is alleged in the complaint that the board of commissioners did not make any order laying out or establishing the highway. This seems to be verified by the record. It is also alleged that the plaintiff was not a party to the proceeding in the circuit court. The contrary of this, we think, is shown by the record. The record shows the following proceedings before the board of commissioners. At the June term of the board, 1866, S. W. Williams and seventeen others filed their petition for the establishment of the road, describing it specifically, and stating that it ran through the lands of the plaintiff, amongst others, and praying for the appointment of viewers, &c. The board thereupon, "upon proof of legal notice" appointed viewers, who at the September term of the board, of the same year, reported that the road was of public utility, and that they had laid out and located the same. Before any further action was taken, but at the same term of the board, the appellee and one Nathan Baker (who was originally joined with the appellee as one of the plaintiffs in the cause, but as to whom the cause was dismissed before its final determination) filed their claim for damages on account of the road running through their land, and asked that viewers be appointed to assess them. Viewers for that purpose were accordingly appointed, who at the December term, of the same year, reported against the claim for damages. At the same term of the board, the appellant, said Nathan Baker, and one Stephen Cofer, filed a remonstrance against the establishment of the road, on the alleged ground of public inutility, and asked that reviewers be appointed, which was done; and at the March term, 1867, the reviewers reported that the road was of public utility. Thereupon the said Stephen Cofer put in a claim for damages, and asked that viewers be appointed by the board to assess them, which was done; and at the June term of the board, of the same

year, the viewers reported, assessing the damages of Cofer at fifty dollars. The record of the board proceeds to state that the board refused to pay the damages thus assessed in favor of Cofer, out of the county treasury; "and Samuel W. Williams *et al.* regarding the amount of damages assessed as being excessive, and refusing to pay the same, they therefore pray an appeal," &c., "which is granted," &c.

Here the chronicles of the board of commissioners end. That body made no order, in terms, establishing the road, or refusing to establish it.

We come to the case in the circuit court. The cause was there docketed as an appeal from the board of commissioners, in the name of Samuel W. Williams and the other seventeen petitioners, as plaintiffs, *v.* Stephen Cofer, as defendant. If the case was properly appealed as to the appellee in this case, we deem it unimportant that his name should have found its way into the docket in entitling the cause. The record before us is evidently imperfect, not showing what papers were filed, nor that the cause was submitted to the court for trial; but after entitling the cause, it proceeds as follows:

"Come now the parties by counsel, and the court being fully advised in the premises, finds that the proposed road described in the petition of the plaintiffs and the report of the viewers, to wit (describing it), is of public utility, and that the defendant Stephen Cofer will sustain damages on account of the location and construction of said road, to the amount of ten dollars. Whereupon it is ordered that said road be opened and kept in repair thirty feet wide upon the route aforesaid by the supervisors through whose districts it runs; and it is further ordered that the said sum of ten dollars, the damages sustained by said Stephen Cofer as aforesaid, be paid out of the county treasury of the county of Hendricks."

It is objected by the appellee, to the proceedings in the circuit court, that they are void for want of jurisdiction, inasmuch as the appeal was from an order of the board not *final*. We are of opinion that the order of the board, re-

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fusing to pay the damages awarded out of the treasury of the county, was sufficiently final to authorize an appeal to be taken therefrom. It put an end to the case. The statute on the subject is a little ambiguous, but we take it to be clear that the damages assessed may be ordered to be paid out of the county treasury; that the road cannot be opened, worked, or used, until the damages are paid by some one, or deposited in the county treasury for the use of the party entitled to them, or until the party to whom the damages are due shall give his consent thereto, in writing, filed with the auditor. We are of opinion, also, that the fair inference to be drawn from the provisions of the statute, though not stated in express terms, is that the petitioners would have a right to pay the damages assessed, and have the road opened. 1 G. & H. 364, secs. 21, 25.

The order of the board refusing to pay the damages out of the treasury as effectually put an end to the cause as if they had ordered, in terms, that the cause be dismissed unless the petitioners would pay the damages. In *Crossly v. O'Brien*, 24 Ind. 325, it was held, that a party might appeal from an order of the board dismissing the petition unless the petitioners would open and maintain the road at their own expense. Such conditional dismissal is no more final than the determination of the main question upon which such conditional dismissal must follow. It is substance, and not so much form, that should be regarded, especially when the validity of a record is attacked collaterally, as in this case. When the board made the order refusing to order the money paid out of the county treasury, the petitioners had the option of paying the damages or appealing to another court. The action of the board was final in substance, if not in form.

It may be remarked, in passing, that the right of appeal from the decisions of the board in road cases, or in other cases, is not in terms limited to *final* decisions. 1 G. & H. 253, sec. 31; *id.* 364, sec. 26. Under the general language of these provisions, "from all decisions" in the one case.

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and "any decision" in the other, we think the decision appealed from was sufficiently final to authorize the appeal.

The appeal when taken took the whole case to the circuit court, and the appellee was bound at his peril to look to his interests in that court, he having been a party to the proceedings in the commissioners' court, and the appeal having been taken in term.

The circuit court had full power to make a final disposition of the cause. *McPherson v. Leathers*, 29 Ind. 65.

On the whole, we are of opinion that the complaint did not show that the road was not legally established, and therefore, that no ground was shown for enjoining the defendants below from opening and working it. The demurrer to the complaint should have been sustained.

The judgment below is reversed, with costs; and the cause is remanded for further proceedings.

C. C. Nave, for appellants.

L. M. Campbell, for appellee.

BOLLENBACHER v. ABLE.

SUPREME COURT.—*Conflicting Evidence*.—The Supreme Court will not reverse a judgment on the evidence, where it is conflicting and consists of the testimony of witnesses who testified in the presence of the lower court.

APPEAL from the Monroe Common Pleas.

PETTIT, C. J.—This suit was brought by the appellee against Heppert and Bollenbacher on a note given by them to Able. Heppert was defaulted; Bollenbacher answered, first, admitting the execution of the note by himself and his co-defendant, Heppert, but that before the commencement of the suit, Heppert fully paid and satisfied the note, by pay-

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ing the full amount thereof to one Isaac Kahn, at the instance and by the direction and request of the plaintiff; second, that Heppert was the principal in said note, and that he, Bollenbacher, was only security therein.

The plaintiff replied to these answers by general denial. Trial by the court, finding for the plaintiff for the amount of the note and unpaid interest. A motion for a new trial was made and overruled, and judgment was rendered on the finding for the plaintiff. The only question presented in the record for our consideration is the correctness of the finding of the court on the evidence, all of which is set out. We need only say that it is conflicting, to determine this case; but we add that, in our opinion, it is strongly in favor of the finding of the court below, and that the judge who tried the case, heard and saw the witnesses, and perhaps knew them all and all the surrounding circumstances, was better able and qualified to judge of and determine the weight, credibility, and force of their evidence than we are, even if we had a right to enter into it, which we have not where it is, as in this case, clearly conflicting.

The judgment is affirmed, with five per cent. damages, at the costs of the appellant.

BUSKIRK, J., having been of counsel, was absent.

G. A. Buskirk, J. S. Hunter, and W. R. Harrison, for appellant.

S. H. Buskirk and J. W. Buskirk, for appellee.

McCULLOUGH v. COOK.

PROMISSORY NOTE.—*Demand*—In a suit on a promissory note payable in bank against the maker alone, it is not necessary for the plaintiff to aver or prove a demand of payment at the time and place specified in the note.

APPEAL from the Newton Common Pleas.

BUSKIRK, J.—The appellee brought suit in the court below against the appellant, Robert McCorkle, and George M. Harriman, on a note executed by the appellant to Robert McCorkle, who indorsed the note to Harriman, who indorsed it to the plaintiff. The note was payable and negotiable at the N. S. Bank, at Lafayette, Indiana. The appellee, in the court below, dismissed the action as to McCorkle and Harriman. The appellant answered by a denial. The cause was, by agreement of the parties, submitted to the court for trial. The court found for the appellee the principal and interest of the note. The appellant moved the court for a new trial, which motion was overruled, to which ruling an exception was taken. The evidence is in the record by bill of exceptions. The evidence consists of the note sued on. The refusal of the court to grant a new trial is assigned for error. The appellant insists that the court erred in overruling the motion for a new trial, because it was not proved on the trial that the note had been presented for payment at the time and place named in the note. The suit was dismissed as to the indorsers. When this was done, the action was solely against the maker. In such a case no demand for payment is required. The maker by his note unconditionally agreed to pay the money at the time and place named. His liability was thus fixed. Sec. 82, 2 G. & H., 107, provides, that "in any action or defense founded on a bill or note, or other contract, for the payment of money at a particular place, it shall not be necessary to aver or prove a demand at the place, but the opposite party may show a readiness to pay such demand at the proper place."

Under this section the appellee was excused from either averring or proving a demand. The appellant did not avail himself of the privilege of showing that he was ready at the time and place named to pay the note. The attorneys have referred to and relied on several decisions of this court. Those decisions are not applicable to a case like this. They discuss the question of the liability of indorsers, and not of makers, of commercial paper.

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There was no error committed in overruling the motion for a new trial.

Judgment affirmed, with costs and ten per cent. damages.
J. Wallace and *E. L. Urmston*, for appellant.

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BILL OF EXCEPTIONS.—*Striking Cause from Docket.*—The Supreme Court will presume in favor of the action of the court below in striking a cause from its docket, where the ground on which the order was made is not shown by a bill of exceptions.

APPEAL from the Newton Circuit Court.

WORDEN, J.—This was a complaint by the appellant against the appellee for an injunction. On motion of defendant below, the cause was ordered by the court below, to be stricken from the docket, to which the plaintiff excepted, but filed no bill of exceptions, nor does it in any way appear on what ground the order was made. In the absence of any showing to the contrary, we must presume that the order was correctly made. *Conoway v. Weaver*, 1 Ind. 263. The ground of the action of the court should have been made to appear by a bill of exceptions. *Engard v. Frasier*, 7 Ind. 154.

The judgment is affirmed, with costs.

J. Wallace and *E. L. Urmston*, for appellant.

C. H. Test, *D. V. Burns*, and *G. S. Wright*, for appellee.

COFFIN v. MITCHELL.

PARTNERSHIP.—*Sale of Partner's Interest to His Copartners.*—*Partnership Debts.*

One of a firm composed of two partners sold his interest in the partnership to his copartner, the contract of sale not containing any provision that the buyer should pay the debts of the firm, or that the seller should receive any certain sum, but it being stipulated in said contract that the seller was to be paid in notes and accounts belonging to the firm, and for any excess due him over and above said notes and accounts the buyer was to execute his promissory notes to the seller.

Held, in an action by the seller against the buyer for the failure of the latter to perform his part of the contract, that the facts that, at the time of the sale, the firm was indebted in a sum greater than its entire assets, and that said indebtedness had been paid by the defendant, constituted a good defense.

APPEAL from the Floyd Common Pleas.

PETTIT, C. J.—The appellee has not furnished us with a brief or his views of the questions which arise in the record.

The complaint alleges, in substance, that on the 31st day of July, 1866, Mitchell and Coffin were partners in the wholesale notion business, selling and doing business from peddling wagons, under the name of "F. A. Mitchell & Co."; that on said day Mitchell sold to Coffin his interest, being one-half, in said firm, the whole assets of the firm amounting to eleven thousand eight hundred and twenty-six dollars, and Mitchell's one-half being five thousand nine hundred and thirteen dollars; that Mitchell had performed his part, but Coffin had failed on his part; and demands judgment for six thousand dollars. The contract of sale is in writing, dated July 31st, 1866, and states that Mitchell is to be paid in notes and accounts that Mitchell may have made for the firm in selling goods; and any excess due him over and above the notes and accounts was to be paid in Coffin's notes at six and twelve months.

Coffin answered in five paragraphs; demurrers were sustained to the third, fourth, and fifth, separately, and these rulings of the court are assigned for error.

The third paragraph of the answer avers, that at the time

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of the sale, the firm of F. A. Mitchell & Co. was indebted in the sum of fifteen thousand dollars, all of which the defendant, Coffin, has fully paid.

This answer was a good and full defense to the action, and the court erred in sustaining a demurrer to it. The contract of sale did not stipulate that Coffin was to pay the firm debts, or that Mitchell should be paid a certain sum, but that what was coming to him should be paid in the notes and accounts of the firm, &c. It was the duty, as well as the legal liability, of the firm and of the partners to pay the firm debts first, and if this required more means than all the assets, there was not, and could not be anything going to Mitchell.

The fourth paragraph of the answer sets up, in substance, the same defense as the third; that is, that the debts of the partnership were larger than the assets; and that Coffin paid all of the debts; and asks an account and judgment against Mitchell for the one-half of the amount of the debts which he has paid over the assets in his hands. But it further alleges, that at the time of the written contract of sale by Mitchell to Coffin, there was a further, or verbal, contract, agreement, and understanding, by and between the partners, that Coffin was to take all the assets and pay the debts of the firm, and if anything was due Mitchell after this was done, it should be paid as provided by the contract of sale, in notes, accounts, &c.

This paragraph is good in substance, for the same reasons that the third paragraph is held good, and a demurrer ought not to have been sustained to it; though that part of it which sets up a contract differing from the written one, but made at the same time, might have been stricken out on motion, as irrelevant.

The fifth paragraph sets up the original agreement of partnership, dated March 8th, 1866, whereby Mitchell was to invest six thousand dollars, and Coffin was to invest five thousand dollars, in said firm. Mitchell was to take and control the sale of the goods; Coffin was to purchase the goods; Mitchell was to have five-ninths, and Coffin four-ninths of the

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profits; and it avers that Mitchell did not furnish all of his capital stock, but lacked thirty-nine hundred dollars; that subsequently an additional or supplemental agreement was entered into in writing, by which Mitchell insured Coffin against loss in the firm business, and guaranteed to him the return of all the money he should invest in said business and ten per cent. per annum thereon; that Coffin paid in eight thousand dollars, and Mitchell did not pay in his six thousand dollars; that the sale of the goods was wholly left to Mitchell; that at and before the sale by Mitchell to Coffin, of July 31st, 1866, Mitchell *fraudulently* represented to Coffin, "that they had realized large profits, and that the assets of the firm, including accounts for goods sold, were twenty thousand dollars;" that relying upon these representations and believing them to be true, Coffin made the contract of July 31, 1866, and received the assets of the firm, of twelve thousand dollars; that at the same time the firm liabilities were sixteen thousand dollars; and that Coffin paid all of the liabilities, leaving a balance in his favor of four thousand four hundred dollars. A set-off was asked, and judgment for the residue.

Here was a charge of fraud upon a matter of fact, or matters of fact, peculiarly and exclusively within the knowledge of the person upon whom the fraud was charged, together with the other showings, that the assets were not equal to the debts of the firm, which Coffin had paid, as it was his duty to pay, before Mitchell could by law, right, or justice, claim the proceeds of any part of them.

The court erred in sustaining a demurrer to this paragraph of the answer. It is not, in our opinion, necessary to notice the subsequent parts of, or rulings in, the record; for if the court had ruled properly on these paragraphs of the answer, they ought not, and probably would not, have been made; and hence we hold that they do not properly arise in the record.

The judgment is reversed, at the costs of the appellee; cause remanded, with instructions to the court below to over-

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rule the demurrers to the third, fourth, and fifth paragraphs of the answer, and for further proceedings.

W. Q. Gresham, J. H. Butler, J. H. Stotsenburg, and T. M. Brown, for appellant.

G. V. Hawk, A. Dowling, and J. S. Davis, for appellee.

FRAVEL v. SPRINGFIELD TOWNSHIP, LAPORTE COUNTY.

JUDGMENT.—*Suit on.*—*Justice of the Peace.*—A judgment of a justice of the peace, rendered against a defendant on his default, may be made the foundation of an action commenced within ten days after the rendition thereof.

APPEAL from the LaPorte Common Pleas.

DOWNEY, J.—The only question involved in this case is, whether a judgment of a justice of the peace, rendered against a defendant, on default, can be made the foundation of an action commenced thereon within ten days after the rendition thereof.

The statute relating to these judgments provides, that "such judgment by default may be set aside, on motion, at any time within ten days thereafter, on payment of all costs, and when so set aside, the justice shall set a day for trial and cause at least three days notice thereof to be given to the plaintiff, and if judgment by default shall a second time be entered, it shall not again be set aside." 2 G. & H. 593, sec. 62.

It is further provided, that "justices shall, unless otherwise directed, issue executions on all judgments when the party appeared, after four days from the rendition thereof, and in cases of judgment by default after the expiration of ten days from the rendition thereof: provided, that in cases of judgment by confession, and in cases commenced by *capias*, and in cases when it shall be made to appear by affidavit that

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delay will endanger the collection of the judgment, execution shall be issued immediately after entering judgment." 2 G. & H. 600, sec. 76.

It is a well settled rule, that a valid personal judgment may be made the foundation of an action, either in the same or in another court; and this may be repeated at the pleasure of the party to whom the debt is due. The record of a judgment is the highest evidence of indebtedness, requiring only to be alleged and produced in evidence in order to shut out all question as to that fact. But if it can be shown that the judgment has been set aside, reversed, or satisfied, it no longer serves the party as an available cause of action.

We do not think that there is anything in the section of the statute first above quoted which changes this rule in its application to judgments of a justice of the peace rendered by default of the defendant, during the first ten days after their rendition. They would hardly have been styled judgments, and provision made for setting them aside, unless it had been intended and understood that they were valid and effective judgments.

The right to take out an execution on a judgment is not decisive of the question as to the validity of the judgment. The judgment may be in a dormant condition, or the execution may be stayed or superseded. And by the terms of the section of the statute secondly above referred to, it will be seen that during the ten days next after the rendition of judgment by default, by a justice of the peace, execution may be taken out simply by filing an affidavit of a single fact.

We think the common pleas, in sustaining a demurrer to the complaint because it showed that the judgment of the justice of the peace was rendered by default and was not yet ten days old, committed an error.

The judgment is reversed, with costs, and the cause remanded.

T. S. Cogley, for appellant.

The Toledo, Wabash, and Western Railway Co. v. Weaver.

THE TOLEDO, WABASH, AND WESTERN RAILWAY COMPANY v.
WEAVER.

PLEADING.—*Railroad.—Injury to Animals.*—A complaint in an action commenced before a justice of the peace against a railroad company, to recover for the killing or injuring of an animal by a passing train of cars, must either contain an allegation of negligence on the part of those in charge of the train, or aver that the road was not fenced, and must allege that the train belonged to said company or was being run over its road.

APPEAL from the Tippecanoe Circuit Court.

BUSKIRK, J.—The appellee filed before a justice of the peace of Tippecanoe county a complaint against the appellant, in the following words:

"Bulah W. Weaver complains of the Toledo, Wabash, and Western Railway Company, and says that on the 27th day of June, 1868, the No. four express train running east did run over and kill one work ox, of the value of forty-five dollars, and, at the same time and place, cripple one two-year-old heifer to the damage of fifteen dollars; wherein the plaintiff claims judgment for sixty dollars, and damages for loss and use of said work ox at fifty cents per day, one hundred and nine days - - - - - \$54.50.

(Signed)

BULAH W. WEAVER."

The appellant did not appear before the justice of the peace. There was a default and assessment of the damages. The appellant appealed to the circuit court. The circuit court, on motion of appellant, struck out of the complaint all that relates to the loss and use of the work ox, and refused to dismiss the action. There was a trial by the court, a finding for appellee, motion for a new trial made and overruled, to which ruling an exception was taken. There was a motion in arrest of judgment, which was overruled, and to this ruling an exception was taken. The evidence is in the record. The motion in arrest of judgment presents for our consideration the sufficiency of the complaint. The complaint is fatally defective. It is not good at common law,

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because there is no allegation of negligence on the part of those in charge of the train. In a common law action of this character, it is essential under any system of pleading that so material a fact as the negligence and carelessness of the defendant should be expressly averred. *Indianapolis, &c., R. R. Co. v. Clark*, 21 Ind. 150; *Indianapolis, &c., R. R. Co. v. Brucey*, 21 Ind. 215; *Thayer v. The St. Louis, &c., R. R. Co.*, 22 Ind. 26; *The Toledo, &c., R. W. Co. v. Reed*, 23 Ind. 101.

The complaint is not a good cause of action under the statute, because it does not aver that the road was not fenced. *The Toledo, &c., R. W. Co. v. Reed, supra*; *Indianapolis, &c., R. R. Co. v. Brucey, supra*; *The Toledo, &c., R. W. Co. v. Lurch*, 23 Ind. 10.

The complaint is also bad because it does not allege that the train which it was alleged ran over and killed the cattle belonged to the appellant, or was being run over its road. The motion in arrest should have been sustained.

Judgment reversed, with costs, and cause remanded, with directions to sustain the motion in arrest of judgment.

W. Z. Stuart, for appellant.

G. O. & A. O. Behm, for appellee.

HORR and Others v. BRUNER and Another.

APPEAL from the Clark Common Pleas.

DOWNEY, J.—This was an action brought by the appellees against the appellants, to recover possession of certain articles of personal property. The property in question was levied on by Horr, as sheriff, by virtue of an execution issued on a judgment recovered by the other appellants against Henry Bruner, the husband of the appellee Julia A. Bruner. The case turned on the question whether the property for which the action was brought was the property of Julia or

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her husband. The case was tried by the court, without a jury, by consent of the parties, and there was a finding and judgment for the plaintiff. A motion for a new trial was made, on the grounds that the finding was not supported by sufficient evidence, and was contrary to law. The only error assigned is, that the court improperly overruled the motion for a new trial.

We have examined the evidence, which is all in the record, and are of the opinion that it fully justified the finding of the court.

The judgment is affirmed, with costs.

G. V. Howk, C. D. Howk, and J. Reid, for appellants.

J. G. Howard, J. H. Stotsenburg, and T. M. Brown, for appellees.

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PARTIES.—Assignor.—Demurrer.—In a suit on a note and mortgage by one to whom they have been assigned, not by indorsement, but by a separate instrument, the assignor should be made a defendant, to answer as to the assignment; and if he be not made a party, the defect may be reached by demurrer assigning a defect of parties defendants, but not by demurrer assigning want of sufficient facts.

VENDOR AND PURCHASER.—Title.—Purchase-Money.—Injunction.—A suit on a note and to foreclose a mortgage on real estate executed to secure said note will not be enjoined on the ground that the note and mortgage were given for an unpaid balance of the purchase-money of the land mortgaged; that a suit is pending in the proper court, brought by third persons by the procurement of the vendor, who is actively prosecuting the same, to set aside the title of the vendor's grantor as to a part of the land, and to recover said part from the grantee, between whom and the persons prosecuting said suit there is no collusion; that said vendor is a resident of another state, and has no property here except said mortgage, and is reputed to be insolvent; that the vendee in taking the conveyance relied more on the validity of the title than on the covenants in the deed, and had no knowledge of the alleged defect in the title or of facts on which such defect could be predicated; it not appearing that there

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was any fraud on the part of the vendor in reference to the title, or that he was solvent at the time of making the deed, or that the vendee did not know that he was insolvent and a non-resident at that time.

APPEAL from the Elkhart Common Pleas.

DOWNEY, J.—Downing sued Strong, to foreclose a mortgage executed by Strong to one Weeks, to secure the payment of two promissory notes. The notes and mortgage had been assigned by Weeks to Downing by a separate instrument, and not by indorsement.

There was a demurrer to the complaint for the reason that it did not state facts sufficient to constitute a cause of action, which was overruled, and exception taken.

This is the first error assigned. We discover no defect in the complaint, except that as Weeks did not indorse the notes, but assigned them by a separate writing, he should have been made a defendant to answer as to the assignment. 2 G. & H. 38, sec. 6.

But this defect is not reached by demurring in the form which was adopted by the appellant. He should have demurred for the reason that there was a defect of parties. *Collins v. Nave*, 9 Ind. 209; *Mandlove v. Lewis*, *id.* 194.

The first paragraph of the answer was a general denial. In the second paragraph, which assumes the form of a cross complaint, it is alleged, that the notes and mortgage were given for part of the purchase-money of the tract of land described in the mortgage; that Weeks, the payee, was the attorney in fact of the appellee, and as such, in his name, executed the deed, and took the mortgage and notes to himself and then assigned them to the appellee; that the appellee conveyed the land to defendant by a warranty deed, a copy of which is filed with the cross complaint; that the price of the land was fifteen hundred dollars, and that two hundred dollars thereof had been paid; that Downing resides in the State of California, and has no property here, except the mortgage, and is reputed to be insolvent; that there is a suit pending in the circuit court of Elkhart county, brought by sundry persons against the defendant and others, in which

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the plaintiffs are seeking to recover thirteen-fourteenths of the land; that the plaintiff procured said action to be brought and is actively engaged in its prosecution; that there is no connivance or collusion between the defendant and the persons prosecuting the suit; that when he took the deed he relied on the validity of the title more than on the covenants in the deed, and was ignorant of the alleged defects in the title, as well as the facts upon which such defect could be predicated; that the plaintiff has never had the legal title to more than one-fourteenth of said land except as derived through one Weston, whose title it is sought to set aside in such suit; that the success of the plaintiff in that action will deprive the defendant of all title and right to the mortgaged premises. A copy of the complaint in the action in the circuit court is made part of the cross complaint.

Prayer, that the plaintiff may be restrained from proceeding to foreclose the mortgage, &c., and that if the land shall be taken away from the defendant by the result of the action in the circuit court, the notes and mortgage may be surrendered up to him.

The cross complaint is verified by the affidavit of one of the defendant's attorneys, for and on behalf of the defendant, who swears that the allegations are true as he verily believes.

There was a demurrer to this paragraph of the answer and cross complaint, which was sustained by the court.

The case was then submitted to the court for trial, and there was a finding for the plaintiff, a personal judgment rendered against the defendant, an order made for the sale of the mortgaged premises and for execution for any amount remaining due after exhausting the mortgaged premises.

It is quite clear that the facts set up in this paragraph do not amount to a defense at law against a judgment for the purchase-money, nor do we understand the appellant to insist upon that. But it is claimed by him that they show such a case as will justify and require the enjoining of the collection of the purchase-money, until the suit in the circuit

court shall have been ended, and perpetually, if that suit shall result in taking the land away from him.

Our inclinations have been towards the allowance of the injunction, and we have examined, carefully, the authorities relied upon to sustain the right to it; but the result of the examination has been to satisfy us that, upon the facts stated, the claim to injunctive relief cannot be allowed. There is in the cross complaint no allegation of fraud, which seems to be an important element to justify the interposition of the chancellor. It is not alleged that the grantor, Downing, was solvent at the time of making the deed, nor that the appellant did not know of his insolvency and non-residency, at that time. Indeed, the conveyance itself shows that he was a resident, at that time, of California.

In *Warren v. Carey*, 5 Ind. 319, it was alleged that there were false and fraudulent representations with reference to the title, on the faith of which the deed, &c., was taken, and the party entered into possession; that the grantor had removed from the State, and had become insolvent. There was also a positive allegation of a want of title to two-fifths of the land, while here there is no such allegation, but only a statement that a suit was pending involving the title, which might result in depriving the appellant of the land.

In *Fitch v. Polke*, 7 Blackf. 564, the court say, "It appears that the complainant was deceived by the false representations of the vendor as to his title," &c.

In *Patton v. Taylor*, 7 How. 132, it is held, that a bill in chancery filed by the purchaser of land against his vendor to restrain the collection of the purchase-money upon the two grounds of want of title in the vendor and his subsequent insolvency, without charging fraud or misrepresentation, cannot be sustained. See, also, *Wilcy v. Fitzpatrick*, 3 J. J. Mar. 582. The demurrer was rightly sustained.

We need not examine the question made by the appellee as to the verification of the cross complaint.

There is nothing showing any error in the disposition of the case after sustaining the demurrer to the cross complaint.

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The record shows that the appellant refused to plead over, but abided the decision of the court upon the demurrer to his cross complaint; that the cause was submitted to the court for trial, "by the plaintiff," and the court having heard the evidence, &c., finds, &c. The appellant argues that there was error "in the rendition of judgment as upon default, there being on file an answer of general denial." But this position is in contradiction of the record, for it says the cause was submitted to the court "for trial," &c.

The judgment is affirmed, with one per cent. damages and costs.

W. A. Woods and *J. D. Arnold*, for appellant.

J. H. Baker and *J. A. S. Mitchell*, for appellee.

THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY *v.*
THE CITY OF LAWRENCEBURG.

CITY.—Railroad on Street.—Ordinance.—A city granted to a railroad company the right to locate and construct its railroad through said city and upon the streets thereof, by an ordinance containing a provision that where the grade of said railroad should be higher than the street, alley, or public ground, said company should "fill up each side of their said road, to form a convenient passage over the same." The company, in pursuance of said ordinance, constructed its road along a certain public street of said city, and in so doing, erected an embankment upon which it placed its track; and the city caused the remainder of the width of said street to be filled up and graded level with the embankment and the railroad, the company having refused to do so.

Held, in an action by the city against said railroad company to recover the expense of the work so caused to be done by the city, that it was no defense to say that said street at the time of the construction of said railroad was unimproved, and had neither sidewalks nor gutters, and had never been graded or paved; or to say that after the building of the railroad and before the filling up of the street by the city, the part of the street so filled up was in as good condition for passage or travel as before the building of the railroad.

APPEAL from the Dearborn Common Pleas.

The Indianapolis and Cincinnati R. R. Co. v. The City of Lawrenceburg.

WORDEN, J.—On the 25th of September, 1852, the common council of the city of Lawrenceburg passed an ordinance giving to the Lawrenceburg and Upper Mississippi Railroad Company (the former name of the present appellant) the right to locate and construct her railroad through said city, and upon the streets thereof, as specified in the ordinance. The second section of the ordinance is in these words, viz.: "That it shall be the duty of said company whenever their work shall be laid upon or across any such public street, alley or ground, to make and keep up all necessary crossing places for the convenient passing over said road, with horses, teams, &c., and where the grade of said road shall be higher than such street, alley or public ground, the said company shall fill up on each side of their said road to form a convenient passage over the same. Such company shall also build such culverts under or over their said road as may be necessary for the drainage or sewerage of said city, as may be directed by the marshal of said city."

The city sued the railroad company, alleging, in substance, that the latter, in pursuance of the ordinance, located and constructed her railroad, with side tracks and switches, upon a public street in said city, called New street, which had been dedicated to the public and used as such public street for more than sixty years; that on that portion of New street which lies between Short street and Walnut street, the company erected a high embankment, varying from four to ten feet in height, and upon it placed her railroad, side tracks and switches, and thereby obstructed the street, &c.; that in order to make the street convenient for passage over the same, as before the embankment, it was necessary that the whole width of the street, between the streets above named, should be filled up and graded level with the embankment and with the railroad upon the same, and that it became the duty of the company to thus fill up and grade said street, but that she refused to do so; that the city being liable to the public for the condition of the street, upon the refusal of the com-

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pany to fill up and grade the same as aforesaid, caused the same to be done; and the suit is brought to recover the expense thereof.

A demurrer was filed to the complaint, and overruled. Exception.

The defendant then answered, first, by general denial; second, that by the license of the city under the ordinance, she constructed her railroad along the south-east side of New street, along the side of, and parallel with, her depot, and that her road bed occupied about one-half of the street, but as to the other part of said street, between, &c., the same was, at the time the defendant completed her road upon said part of said street, and from that time until the plaintiff caused the same to be filled up as in the complaint mentioned, in as good condition and as convenient for passage over the same, and travel of the public and teams, horses, drays, wagons, &c., over and along the same, as said part of said street was at the time of the construction of her said railroad; and that in the construction of her road on the south-east side of said street, she did not obstruct the other side of the same; and that while constructing her road she built a culvert across New street, at the mouth of an alley between Walnut and Short streets, which carries off the water that flows down the alley across New street under her railroad and depot into the Ohio river, and prevents the water from running upon said street; third, that by permission of the plaintiff, she did build her road on the south-east line of New street, between Walnut and Short streets, as she had a right to do, having acquired the right of way under the ordinance mentioned in the complaint; that her road bed occupies about one-half the width of said New street between Walnut and Short streets; that at the time of the construction of her railroad, New street, between, &c., was unimproved in every respect, never having been graded or paved, nor any sidewalks or gutters constructed thereon, and that in the construction of her railroad she did not in any manner obstruct, change, or alter that part of said street not oc-

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cupied by her road bed, but that said part of said street, from the time of the construction of her said road until the time of the filling of the same in the manner in the complaint mentioned, was in as good a condition for the use of the public and for passage and travel as when her said railroad was built along the line of the same.

Demurrers were sustained to the second and third paragraphs of the answer, and exceptions taken. The general denial being withdrawn, there was final judgment for the plaintiff.

The rulings of the court below on the several demurrers present the only questions for our consideration.

It seems to us that the several rulings were correct. There can be no doubt that as the railroad company accepted the ordinance of the city, and built her railroad through the city in virtue thereof, she was bound to comply with the terms and conditions specified in the ordinance. We have seen that the ordinance requires that "where the grade of said road shall be higher than such street, alley or public ground, the said company shall fill up on each side of their said road, to form a convenient passage over the same." It is no answer to this provision of the ordinance to say that the street on which the railroad was built was unimproved, and had neither sidewalks nor gutters, and was never graded or paved; nor to say that after the building of the railroad, and before the filling up of the street by the city, the street was in as good a condition for passage or travel as before the building of the railroad. The ordinance requires that where the grade of the railroad is higher than the street, &c., the company shall fill up on each side, &c., and this is to be done without reference to the question whether the street, after the railroad is built, is as passable as it was before, or not.

The railroad company was bound by the ordinance to fill up the street, but having refused to do so, and it having been done by the city, the latter can maintain the action to recover the expense thereof.

Morback and Others *v.* The State, *ex rel.* Jackson Tp., Ripley County.

The judgment below is affirmed, with costs and two per cent. damages.

D. S. Major and *O. B. Liddell*, for appellant.

J. Schwartz, for appellee.

MORBACK and Others *v.* THE STATE, on the Relation of
JACKSON TOWNSHIP, RIPLEY COUNTY.

PLEADING.—*Township Trustee.—Suit on Official Bond.*—In an action on the official bond of a township trustee, on the relation of the township, to recover a certain amount of school money belonging to the township, which said trustee had refused to pay over to his successor in office, the complaint failed to allege that said trustee, as such, had received any money which he had not expended according to law, and which he had in his hands when he went out of office.

Held, that for want of such an averment, the complaint was bad on demurrer.

APPEAL from the Ripley Circuit Court.

BUSKIRK, J.—The appellee commenced an action in the court below, against the appellants, on the official bond of Morback, as trustee of Jackson township, in Ripley county, to recover a certain sum of school money which it is alleged belonged to the said township, and which the said trustee had refused on proper demand to pay over to his successor in office. The other appellants are the sureties of the said Morback.

The complaint alleges that Morback was duly elected trustee of said township, and gave bond, which is filed with the complaint, took the oath of office, and entered upon the discharge of the duties of such office. The complaint then assigns the following breach of the condition of the said bond:

“Said plaintiff or relator avers that during the term aforesaid, while the said Morback was the acting trustee of said Jackson township, as aforesaid, the sum of one thousand five

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hundred and sixty-four dollars and twenty-six cents in cash, of the school money belonging to the said township, as follows, to wit: seven hundred and ninety-seven dollars and fifty-three cents of the school fund, and seven hundred and sixty-six dollars and seventy-three cents of special school funds. All of which money as aforesaid the said Nicholas Morback wholly failed, neglected, and refused to pay over to his successor in said office, John W. Newman, and still refuses, although often requested so to do by the said Newman; wherefore," &c. !

The appellant demurred to the complaint. The demurrer was overruled, and an exception was taken to such ruling. The appellant filed an answer in one paragraph, to which the appellee demurred. The demurrer was sustained, but no exception was taken to the ruling of the court. The appellant refused to answer further. There was a trial by the court, by agreement of the parties, and a finding and judgment for appellee.

The overruling of the demurrer to the complaint is assigned for error, and this is the only question submitted for our decision. We think it is quite clear that the court erred in overruling the demurrer to the complaint. This was an action on the official bond of a township trustee. Neither the trustee nor his sureties would be liable, unless it was alleged and proved that money belonging to the township had come into the hands of the trustee for which he failed properly to account. There is no allegation in the complaint that any money ever came into the hands of the appellant Morback, as such trustee. It may be a mistake in the draftsman of the complaint, or it may have occurred in copying the complaint into the transcript. But however it occurred, there is no such allegation. The appellee has not favored us with a brief, or asked to have the record corrected. We have to decide the case upon the record before us. It is an essential allegation, and its omission is fatal.

Besides, we do not think the assignment of the breach is broad enough, even if it had been shown that he had received the money. The trustee of a township is required by

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law to expend the school funds coming into his hands, and to make a settlement with the board of commissioners. There is no averment that he had not lawfully paid out the money. The trustee was not required to pay over the money to his successor, unless it was alleged that he had received money and had not paid the same out according to law. His refusal to pay to his successor constituted no breach of the condition of his bond, unless it was alleged that he had received money, which he had failed to expend according to law, and had the money in his hands when he went out of office. For the error of the court in overruling the demurrer to the complaint, the judgment must be reversed.

Judgment reversed, with costs, and cause remanded, with directions to the court below to award a new trial, and to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

H. W. Harrington and M. K. Rosebrough, for appellants.

E. P. Ferris and H. T. Lipperd, for appellee.

SKEEN and Wife *v.* MUIR and Others.

NEW TRIAL.—*As of Right.*—Where a new trial is granted as of right under section 601 of the code, at a term after that at which the judgment was rendered, the party against whom the new trial is granted cannot be required to go to trial at the term at which the new trial is granted.

SAME.—*Notice.—Statute Construed.*—The notice contemplated by section 602 of the code is to be given *after* the application for a new trial has been granted.

SAME.—*When to be Granted.*—In a suit by the purchaser of real estate in possession under the contract of purchase, to compel the vendor to make a deed therefor to the plaintiff and accept from him a mortgage for unpaid purchase-money, and to set aside as void a deed made by the Auditor of State for said land sold at a sinking fund sale, for having been procured by fraud, and enjoin the execution of a writ of possession issued by said Auditor, judgment was rendered against the defendants.

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Held, that the defendants were entitled to a new trial as of right under section 601 of the code.

VENDOR AND PURCHASER.—Pleading.—Possession.—Parties.—In said action the complaint showed that said vendor had given a title bond for said real estate to the plaintiff, and that at the same time it was agreed between the parties that the plaintiff should take possession of the land until the time specified in the bond for the conveyance thereof; that the plaintiff had taken and still retained possession of the land under and by virtue of said agreement; that said vendor had received as part payment a certain sum; and that by fraud he had caused the land to be sold from under the plaintiff, and himself held the equitable title under said sale, though another held the legal title, which was purchased with the money of said vendor and was held in trust for him.

Held, that said vendor was a proper party-defendant.

Held, also, that the averment of the complaint in reference to the placing of the plaintiff in possession of the land was not an attempt to vary or add to the title bond by parol, nor was it irrelevant matter or surplusage.

DEMURRER.—By Several Parties.—A joint demurrer by two or more defendants to a complaint should be overruled as to all of them if the complaint be good as to any of them.

APPEAL from the Ripley Circuit Court.

PETTIT, C. J.—This suit was brought to set aside and declare void a deed made by the Auditor of State for lands purchased at a sinking fund sale, as having been procured by fraud, and enjoin the execution of a writ of possession issued by said auditor, the plaintiff being in possession by virtue of a contract of purchase, and to compel the vendor to make a deed and accept a mortgage for unpaid purchase-money. Defendants were defaulted; trial by the court, and judgment for the plaintiffs. Defendants in vacation gave notice to plaintiffs that they would pay the costs, take a new trial under section 601 of the code, and that the cause would stand for trial at the next term. Costs were paid and a new trial granted over the objection and exception of plaintiffs. The granting a new trial as of right under section 601 is assigned for error.

We think this was not error, and are sustained in our view by *Bender v. Sherwood*, 21 Ind. 167; *Moor v. Seaton*, 31 Ind. 11. There are other cases in point, but it is unnecessary to cite them.

The court held that the cause stood for trial at the same

Skeen and Wife v. Muir and Others.

term at which the new trial was granted, over the objection of plaintiffs; and this is assigned for error.

Section 602 of the code provides, that "if the application for a new trial is made after the close of the term at which the judgment is rendered, the party *obtaining* the new trial shall give the opposite party ten days notice thereof before the term at which the action stands for trial." The notice given before the new trial was granted was not required by law, was a nullity, and gave the party giving it no rights; nor did it impose any duty or obligation on the adverse party. The statute clearly contemplates that notice shall be given *after* the new trial is obtained. The party against whom the new trial is granted is not obliged to prepare for trial until the order is entered and he has ten days notice before the next term. Nor can the party obtaining the new trial be compelled to go to trial at the term at which the new trial is granted. In the case of *Murray v. Kelly*, 27 Ind. 42, the court say, "A new trial under this provision is a matter of right, and no notice to the adverse party is required." For this error the case must be reversed.

A motion was made at the proper time to strike out the amendment to the complaint and parts of the original complaint, and the court struck out from the original the following:

"And the plaintiffs say that in consideration of the premises, at the date of the said title bond, it was stipulated and agreed between the parties that said Mary Skeen should take possession of said real estate and occupy and enjoy the same until the time specified in said bond for the conveyance of said real estate by said John W. Muir to the said Mary Skeen. And plaintiffs aver that said Mary Skeen took possession of said real estate under and by virtue of said agreement, and still holds the possession of the said land."

This was excepted to and is assigned for error. We think the court erred in striking out these words. It was not an attempt to vary, alter, or inject anything into the title bond by parol. It only, and we think very properly, shows that

the plaintiffs were in lawful possession of the land by the consent of the vendor, John W. Muir; nor was it irrelevant or surplusage; nor was the second paragraph of, or amendment to, the complaint irrelevant to the subject matter of the suit as stated in the original complaint; and though it may be defective in some respects, it ought not to have been stricken out. The motion to strike out does not perform the office of a demurrer. *Port v. Williams*, 6 Ind. 219.

The defendant John W. Muir demurred separately to the complaint because it did not state facts sufficient, and because he was improperly joined as a defendant, which was sustained by the court and excepted to. This was error. The complaint shows that Muir had given a title bond to the plaintiffs and put them in possession of the land; that they still retained the same; that he had received as part payment therefor six hundred and twenty-five dollars; that by fraud he had caused it to be sold from under them; that he now holds the equitable title under said sale, though another holds the legal title, which was purchased with the money of Muir; and that it is held in trust for him. All of the defendants joined in a demurrer to the complaint because it did not state facts sufficient, and because John W. Muir was improperly made a party, and because Elma Muir was improperly joined as a party-defendant. The court sustained this demurrer. This was error. It should have been overruled. A joint demurrer by two or more parties to a complaint which is good as to some of them, is bad as to all, and should be overruled, because a pleading bad as to part is bad as to all the parties to it. *Bicknell Civil Pr.* 99; *Estep v. Burke*, 19 Ind. 87; *Pace v. Oppenheim*, 12 Ind. 533. It follows that the court erred in dissolving the injunction and rendering judgment against the plaintiffs.

The appellees assigned cross errors, that the court erred in refusing to dissolve the temporary injunction, and rendering judgment for the plaintiffs on the default of the defendants and trial by the court. These are not well taken, and are sufficiently answered in the foregoing opinion.

Hall v. Hall and Another.

The judgment is reversed, at the costs of appellees; and the cause is remanded for further proceedings in accordance with this opinion.

E. P. Ferris, H. T. Lipperd, H. W. Harrington, and M. K. Rosebrough, for appellants.

J. Gavin and J. D. Miller, for appellees.

HALL v. HALL and Another.

SUPREME COURT.—*New Trial.*—*Small Excess of Damages.*—The Supreme

Court will not reverse a judgment because of a very small excess of damages.

EVIDENCE.—*Declarations of Agent.*—The declarations of an agent are not admissible in evidence in favor of his principal, either before or after the death of the agent.

SAME.—*Admissions.*—*Contrary Declarations.*—Where the statements of a party have been proved, as admissions, and not with a view to impeach him as a witness, he will not for that reason be allowed to prove his own statements at other times, of an opposite character and in harmony with his own testimony.

PRINCIPAL AND SURETY.—*Mutual Sureties.*—Where a promissory note is executed by two persons, the consideration going one-half to each of them, as between themselves each may be treated as principal for one-half of the debt and surety of the other for the other half.

APPEAL from the Monroe Common Pleas.

WORDEN, J.—This was an action by Permelia Hansford, executrix of the last will of John Hansford, deceased, against the appellant, Benjamin Hall, and the appellee John Hall, upon a note executed by said Benjamin and John Hall to said John Hansford in his lifetime, for the sum of one hundred dollars.

Each of the defendants set up that he was principal on the note to the amount of fifty dollars thereof, and as to the residue he was only surety; and that he had paid his share or more of the note; and asking that whatever might be

found due upon the note might be levied of the property of the other before levying upon his own.

The cause was tried by the court, who found for the plaintiff and assessed her damages at fifty-two dollars and thirty-two cents; and judgment was accordingly rendered in her favor for that sum against the said defendants, John and Benjamin Hall; and the court further ordered that, of the sum thus adjudged to be due the plaintiff, the said John Hall pay the sum of thirty-four dollars and eighty-two cents, and that said Benjamin Hall pay the sum of seventeen dollars and fifty cents.

The said Benjamin appeals from the judgment and order. We find no error in the cause that affects the judgment in favor of the plaintiff against the defendants below. No error is claimed affecting her, except that the damages are excessive. The amount found due may have been something more than an exact computation would have made it, but the excess is trifling, and we are not disposed to regard it. We apply the maxim, *de minimis non curat lex*. We are more inclined to this as the cause was continued from one term to another, after finding and before judgment, without allowing interest for the intervening time.

The case, as between the appellant and the appellee John Hall, presents other questions.

The note in suit appears to have been given for money borrowed by the two Halls, each receiving fifty dollars and uniting in a note for the whole sum. There was an indorsement of a credit on the note of sixty dollars and interest, of the date of May 22d, 1865, and the principal question between John and Benjamin is as to which of them paid the amount thus credited. The evidence tends to show that the amount thus paid was paid by one Noel Hall, a brother of John and Benjamin, who was deceased at the time of the trial. Each of the defendants claimed that he had furnished Noel with that amount, or more, to pay for him on the note; and each claimed to be entitled to the credit.

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On the trial, John Hall testified, amongst other things, that in May, 1865, he gave his brother, Noel Hall, sixty odd dollars, to pay his share of the note and interest. He was then asked by his attorneys whether Noel Hall ever told him that he paid the money. This question was objected to by Benjamin, because it was mere hearsay, &c., but the objection was overruled, and John testified that Noel told him that he, Noel, had paid the money. This was error. The evidence was mere hearsay and inadmissible. We have no brief for the appellee John Hall, and are not advised upon what ground the evidence was admitted. If Noel is to be regarded as having been the agent of John, his declarations would not, therefore, be evidence in favor of his principal, either before or after the death of the supposed agent. The declarations of a man's agent can no more be evidence in his favor than his own declarations.

During the further progress of the trial, it was proved by a witness that Benjamin said that John had paid off his share of the note. Upon this, Benjamin, at the proper time, offered to prove his own statements, at other times, of an opposite character, and in harmony with his testimony on the trial. This was ruled out, and exception was taken. We think there is nothing in this point. The statements of Benjamin were mere admissions, and not proved with a view to his impeachment as a witness.

The finding of the court, on the evidence, can hardly be sustained. The credit for the payment of the sixty dollars endorsed on the note, it would seem from the amount required to be paid by each of the defendants, was allowed by the court in part to each of them, and we find nothing in the evidence to warrant this. As the evidence stood, it seems to us that either the one or the other of the defendants was entitled to the full benefit of the credit, and the difficulty of determining to which it belonged was no valid reason for giving each, in part, the benefit of it.

It is not at all clear that, as between the payee of the note in suit and the makers, the latter are not in every sense prin-

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cipals for the full amount of the note. But as between themselves, the consideration of the note going one half to each, it would seem just to treat each as principal for one-half of the debt, and the other as his surety for that half. *Crafts v. Mott*, 4 N. Y. 603.

But whether the defendants are to be regarded as principal and surety so far as the plaintiff is concerned, or otherwise, the court might, nevertheless, settle the ultimate rights of the defendants as between themselves in this suit. 2 G. & H. 218, sec. 368.

The judgment below in favor of the plaintiff will be affirmed; but that portion of the judgment which determines the rights of the defendants as between themselves, by fixing the amount of the plaintiff's judgment which each of them is to pay, will have to be reversed, for the reasons already stated. This partial reversal, however, will in no manner affect the plaintiff, or stay process to collect her judgment from the defendants or either of them. 2 G. & H. 308, sec. 674. The defendants can proceed as they may be advised, to settle their respective rights as between themselves.

The judgment below in favor of the plaintiff is affirmed; and that portion of the judgment determining the portion which each of the defendants below shall pay is reversed, the appellant, Benjamin Hall, and the appellee John Hall to pay each one-half of the costs in this court.

J. H. Loudon and *J. M. McCoy*, for appellant.

S. H. Buskirk, for appellees.

TURNER and Others v. CAMPBELL, Administrator.

DECEDENTS' ESTATES.—Unclaimed Share.—Parties.—Pleading.—On final settlement of a decedent's estate, in the court of common pleas, a sum of money was received by the clerk of said court as the share of said estate belonging

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to a nephew of the decedent, to be kept by said clerk till said nephew should call for it. Complaint by some of the heirs at law of said decedent against the administrator of the estate of said clerk, deceased, alleging the receipt of said sum by the clerk as above stated; that said clerk died without having been called upon for said money by said nephew, who had not been heard from for seven years; and that the plaintiffs, assuming his death, claimed his share in his uncle's estate.

Held, that the complaint was bad on demurrer assigning as causes, that the plaintiffs had not legal capacity to sue, and that the complaint did not state facts sufficient, &c.

SAME.—*Transfer of Settlement to Circuit Court.*—*Supreme Court.*—An objection to the transfer of the settlement of a decedent's estate from the court of common pleas to the circuit court cannot be made for the first time in the Supreme Court.

SAME.—*Affidavit.*—Where an affidavit upon which such a transfer has been made is not in the record, the Supreme Court will presume that the affidavit was properly made under the statute.

APPEAL from the Hendricks Circuit Court.

WORDEN, J.—The appellants, a part of the heirs at law of Job Turner, deceased, filed their claim, in the form of a complaint, in the proper court of common pleas, against the administrator of the estate of John Irons, deceased. The settlement of the estate was transferred to the circuit court. In the latter court, a demurrer was filed to the complaint, both on the ground that the plaintiffs had not the legal capacity to sue, and because the complaint did not state facts sufficient, &c. The demurrer was sustained, and the plaintiffs excepted. Judgment for the defendant.

The case made by the complaint is, in substance, this: Irons, in his lifetime, was clerk of the court of common pleas of Hendricks county. On the final settlement, in that court, of the estate of Job Turner, a sum of money and a note which was afterwards collected were duly received by said Irons as such clerk, for the share and portion of said estate coming to the children of John Turner, who was a brother of Job, viz.: Isaac P. Turner and Elvira Turner, to be kept by said Irons until said Isaac P. and Elvira should call for the same. Irons departed this life without having been called upon for said money by said Isaac P. and Elvira, and the same remains unpaid.

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It is averred that Isaac P. and Elvira have not been heard from for seven years, and the plaintiffs, assuming them to be dead, claim their share in the estate of their uncle Job.

The demurrer was, beyond question, correctly sustained. The appellants do not appear to have any interest in the matter. They do not appear to be the heirs of Isaac P. and Elvira, or either of them. Assuming, without deciding, that their death is sufficiently averred, it still does not appear but that they left lineal heirs, or heirs other than the plaintiffs, upon whom, on their death, their interests devolved. Again, the claim was personal, and could only be sued for by personal representatives of the parties.

It is urged by the appellant that the estate was wrongfully transferred to the circuit court; no objection, however, was made below on this ground, and none can be successfully made for the first time in this court.

The transfer, moreover, was made on affidavit, and although the affidavit is not in the record, we will presume it was properly made under the provision of law authorizing the same. 2 G. & H. 21, sec. 10.

The Judgment below is affirmed, with costs.

C. C. Nave, for appellants.

L. M. Campbell, for appellee.

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CONTRACT.—*Dependent and Independent Agreements.*—Where a covenant or agreement might be sued upon as independent, but this has not been done until the party who might thus sue has become bound on his part to perform some act under the same contract, the two acts then become dependent, and neither party can sue the other on the contract without first performing or tendering performance on his part.

SAME.—*Mandate.*—*Parol Evidence.*—Where a person subscribed a certain sum to the capital stock of a turnpike company, in consideration of the agreement

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of the agents of the company that, if he would so *subscribe*, a lifetime pass over the road for himself and family should be issued to him by the company; *Held*, in an action by said subscriber against the president of said company for a mandate to compel said president to issue said pass, that if such were a case for a mandate, yet the action would not lie if at the time the suit was brought the money was due on the subscription and payment had not been made or tendered.

Held, also, that parol evidence of said agreement to issue a pass was inadmissible.

APPEAL from the Montgomery Circuit Court.

DOWNEY, J.—This was a proceeding by mandate by the appellee against the appellant, as president of a turnpike company. The complaint alleges that the appellee subscribed two hundred dollars to the capital stock of the company, payable when the road should be completed to a point opposite to his farm; that the agents of the company, to induce him to *subscribe*, promised him, if he would do so, a lifetime pass for himself and family over the road; that they allowed him to travel the road for a time without pay, and then required him to pay toll; and he asks that the president of the road be compelled to issue the pass.

The defendant, in his answer, sets out the written instrument by which the subscription was made, alleges a verbal and voluntary promise of the agents of the company that on *payment* of the subscription by him, and on no other condition, they would cause the pass to be issued to him; that the road had been long theretofore completed to and through the farm of the plaintiff; and that the company had been and were ready to issue the pass on payment of the subscription, but that the plaintiff had not paid the subscription.

The reply was a general denial. Trial by jury, and verdict and judgment for the plaintiff, a motion for a new trial having been made by the defendant and overruled.

The first error assigned is, that the court improperly overruled the defendant's demurrer to the complaint. But we do not find any such demurrer in the record, nor any such action of the court. There is no assignment of error that the complaint is insufficient, and therefore the question is not

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before us. We do not wish to be understood as deciding that the case is one for a mandate. The statute only authorizes the writ to issue to an inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins; or a duty resulting from an office, trust, or station. 2 G. & H. 322, sec. 739.

The second error alleged is, that the court instructed the jury that the contract to pay the subscription and the promise to issue the pass were independent contracts or stipulations, and that the plaintiff could sue for the pass without having paid or offered to pay the subscription, if the jury found that *the making of the subscription* was the consideration for which the pass was to issue, and not the *payment* of the amount subscribed.

And the third error is, that the court refused to instruct the jury that notwithstanding the jury may believe that the plaintiff was entitled to the pass upon subscribing the two hundred dollars, yet if he did not obtain the same until the money became due on the subscription, he cannot have a mandate for the pass until he has tendered the two hundred dollars.

Courts incline to hold covenants or agreements to be dependent, and not independent, when the form of the covenants or agreements will allow them to do so. One reason for this is that it tends to prevent litigation.

The decisions of this court seem to warrant the rule that when a covenant or agreement might be treated as independent and an action brought on it, yet if that is not done until the party who might thus sue becomes bound, on his part, to perform some act under the same contract, the two acts then become dependent acts, and neither party can sue without first performing or tendering performance on his part. *Gillum v. Dennis*, 4 Ind. 417; *Cunningham v. Gwinn*, 4 Blackf. 341; *McCulloch v. Dawson*, 1 Ind. 413.

If we are right in this view, then the court was not right in giving the above charge, or in refusing the one refused.

Board of Commissioners of Jay County *v.* Templer.

Another question raised is as to the propriety of the ruling of the court in admitting evidence by parol of the agreement with reference to the issuing of the pass. It is insisted that the written contract of subscription set out in the answer should exclude the parol stipulation with reference to the pass.

Because one of the parties to the contract has not signed it, it does not follow that other stipulations on the part of that party can therefore be proved by parol. *Keith v. Kerr*, 17 Ind. 284.

It is only where the written instrument appears on its face to be incomplete, and the proposed extrinsic testimony does not, in any degree, tend to contradict or vary the terms of the writing, that such extrinsic evidence is admissible to show the whole contract. *Id.*

To allow the plaintiff to show by parol that at the time the written contract was made, there was a stipulation, on the part of the company, in addition to what was put in the writing, would, in our opinion, violate the well known and well established rule that evidence of parol contemporaneous agreements, by which the written contract between the parties would be contradicted, or something added to or taken from it, cannot be received.

We think the court should have granted a new trial on the motion of the defendant.

The judgment is reversed, with costs, and the cause remanded.

S. C. & L. B. Willson, for appellant.

OFFICE AND OFFICER.—*Compensation of Public Officer.*—The compensation of public officers is fixed and regulated by statute, and in the absence of a statute giving compensation none can be recovered.

Board of Commissioners of Jay County v. Templer.

SAME.—Prosecuting Attorney.—A county is not liable to pay a prosecuting attorney for services rendered by him as prosecuting attorney, at the request of the county commissioners made of him as such attorney, in prosecuting a suit and obtaining judgment against a defaulting officer and his sureties.

APPEAL from the Jay Circuit Court.

BUSKIRK, J.—The appellee filed in the Commissioners' Court of Jay county, an account in the words and figures as follows:

"JAY COUNTY, STATE OF INDIANA,

"To JAMES N. TEMPLER, Dr.

"October 12th, 1865. To services in prosecuting suit and obtaining judgment this day, in the Jay Circuit Court, against Royal Denny *et al.*, defaulting county treasurer and his sureties, for the sum of \$1,668.93, at 5 per cent. - - \$83.45

"October 12th, 1865. To services in prosecuting suit and obtaining judgment, in same court, against Thomas J. Laffollett *et al.*, defaulting trustee of Wayne township, in said county and State, and his sureties, for the sum of \$1,505.97, at five per cent. - - - - - \$75.30

\$158.75

JAMES N. TEMPLER,

Late Pros. Att'y 13th Judicial Circuit."

The commissioners' court refused to allow the claim or any part thereof. Thereupon the appellee appealed the case to the circuit court. In the circuit court, the commissioners appeared by counsel and moved to dismiss the action, for the reason that there was no sufficient cause of action, which motion was overruled and excepted to. By the agreement of the parties, the case was submitted to the court for trial. There was a finding for the appellee, motion for a new trial made, overruled, and excepted to. The evidence is in the record, and it abundantly shows the services mentioned in the account were rendered by the appellee as prosecuting attorney, and that such services were reasonably worth the amount claimed. There is no dispute as to the facts. The only question involved in the case is one of law, and that is, whether the county is legally liable to pay for such services.

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It is not pretended that the services were rendered by the appellee as an ordinary attorney at law, upon the employment of the county, nor is it controverted that the services were rendered at the request of the commissioners, made of him as the prosecuting attorney.

Section four of the act providing for the election, and prescribing the duties, of prosecuting and district attorneys reads as follows: "Such prosecuting and district attorneys within their respective jurisdictions shall conduct all prosecutions for felonies or misdemeanors and all suits on forfeited recognizances, resist applications for changing names, protect the interests of all persons of unsound mind, and superintend on behalf of a county or any of the trust funds, any suit in which the same may be interested or involved, and shall perform all other duties required by law." 2 G. & H. 430, sec. 4.

The appellee was, by the above section, imperatively required to render the services for which he seeks to recover, but there is no provision made to pay him for such services. He is paid out of the State treasury an annual salary of five hundred dollars. Section twelve of the act fixing the fees of officers, 1 G. & H. 334-5, regulates the fees of prosecuting attorneys. The last clause of the section provides, "In all other cases, not specified, when the prosecuting attorney is required to prosecute *or defend*, the fees shall be, in the circuit court and in the court of common pleas, five dollars.

An act entitled "an act relative to the salaries of public officers, and providing the manner of paying the same, and the manner of reimbursing the State for an increase of salaries" (approved March 5th, 1859), fixes the salary of the prosecuting attorney at five hundred dollars. The third section thereof provides, that "the said officers shall receive no other compensation whatever."

It is contended by the appellant, that the prosecuting attorney is not entitled to any compensation for his services except his annual salary of five hundred dollars, payable out of the State treasury, and such fees as are allowed by law, to

be collected off of the defendant in all cases, except on forfeited recognizances, in which cases the fees are paid out of the money collected. See acts of 1861, Spec. Sess. p. 40.

This position seems to be correct. This court, in the case of *Falkenburgh v. Jones*, 5 Ind. 296, states the law thus: "An attorney is not now an officer known to the laws of this State, and hence, his services cannot be required without compensation, but officers entitled to fees or salaries fixed by law, take their offices *cum onere*, and have no legal right to complain, as they are at liberty to resign, at any time, and release themselves from their burdens. Their services are official, and not particular, within the meaning of the constitution."

The compensation of public officers is fixed and regulated by statute, and in the absence of a statute giving compensation, none can be recovered.

It is said by this court, in the case of *Kipper v. Glancey*, 2 Blackf. 356, "In the present case, the county cannot be liable for the fees and charges stated, without an express statute on the subject. It is admitted that there is no such statute."

This court, in the case of *Commissioners of Miami Co. v. Blake*, 21 Ind. 32, say, "At common law, then, the officers depend upon the parties for their fees, except the State, which they nominally serve gratuitously, but, in reality, get their pay, because the State fixes the rate of fees they charge private parties so high as to compensate them, in their aggregate receipts for their services in State cases, where there are acquittals; and this is what is meant when it is said that officers take their offices *cum onere*, and the constitutional provision touching services without compensation does not apply to such."

While we endorse the principle of law stated in the above quotation, we do not want it to be understood that we apply to prosecuting attorneys the remarks of the learned judge who delivered the opinion, in reference to the compensation of the officers that he was speaking about. If the compensation of prosecuting attorneys is too small, the remedy is by an ap-

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peal to the justice of the legislative department. The duty is imposed upon us to decide the law, and not to make it. We hold that the State has by positive law required prosecuting attorneys to render the services performed by the appellee, and has provided no compensation therefor other than his annual salary, and that, therefore, he was not entitled to recover in this action. The court erred in overruling the motion to dismiss the action and for a new trial.

Judgment reversed, with costs, and the cause remanded, with directions to the court below to grant a new trial, and then sustain the motion to dismiss the action.

J. W. Headington, for appellants.

J. N. Templer and *J. J. Adair*, for appellee.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY CO. *v.*
HUME.

SUPREME COURT.—*Evidence*.—The Supreme Court will not reverse a judgment upon the evidence, where it is conflicting.

APPEAL from the Hancock Common Pleas.

DOWNEY, J.—The only error assigned in this case is that the court improperly refused to grant a new trial on the motion of the appellant.

The action was brought by the appellee against the appellant to recover the value of a sow and six pigs, alleged to have been killed by the locomotive and cars of the defendant, by the negligence of the defendant, at a point on said road where the road was not securely fenced. The action was commenced before a justice of the peace, where there was judgment for the plaintiff. The defendant appealed to the common pleas, where, after an amendment of the com-

plaint, and a general denial thereof filed, there was a trial by the court and finding again for the plaintiff.

The defendant moved the court for a new trial for the following reasons: first, the finding of the court is contrary to law; second, the finding of the court is not sustained by, and is contrary to, the evidence in the case.

This motion was overruled by the court, and final judgment was rendered, from which the defendant appealed to this court.

The evidence is made part of the record by a bill of exceptions, and shows the following facts: The sow and pigs were killed at or near the crossing of a public highway. The witnesses differ in their statements as to whether it was at the crossing or near to the same. The train was going west. There was a cow-pit across the railroad track on each side of the highway.

Miles Cook, on behalf of the plaintiff, says, he was trying to drive the stock off the track, when he saw the train coming from the east. Where the stock were on the track it was not fenced on the south side, for a distance of two hundred yards, the fence being down. When he found he could not succeed in driving the stock from the track, he climbed up on the bank, until the train passed. The engine struck the animals east of the east cow-pit. He saw them struck; found one pig dead in the east cow-pit, the sow and three pigs between the east cow-pit and the place where the county road crosses the railroad track. The cow-pit on the east side of the road was so nearly filled with dirt that it was not more than a foot deep.

James McCorkle testified, that he passed by soon after the occurrence, saw a sow and six pigs killed, one pig was in the east cow-pit, four more between the cow-pits, and two pigs were dropped two rods west of the west cow-pit.

On behalf of the defendant, one witness, *Michael Foley*, says he saw the hogs on the crossing shortly before the train came along; did not see the cars strike them. On being told of the occurrence, he went to the place, and found the sow

The Pittsburgh, Cincinnati and St. Louis Railway Co. v. Hume.

and three pigs killed between the cattle-guards, thrown on each side of the railroad track right where the dirt road, which is a county road, crosses the railroad. Two of the pigs were carried by the cars west of the west cattle-guard. There was blood all along from where they were struck. From appearances, thinks they were all struck west of the east cattle-guard, between the two cattle-guards, on the dirt road crossing. Examined the railroad track east of the cattle-guard, and found no hog tracks, no blood, or any signs of hogs having been struck east of the east cattle-guard. There was no pig in the east cattle-guard.

Daniel Burk and *John Laisy*, witnesses for the defendant, went with *Foley*, and describe the position of the dead animals and the appearances in the same way as *Foley* did.

It is at once evident that there is no such state of evidence here as will justify us in saying that the common pleas erred in refusing to grant a new trial. The witness *Cook* seems, of all of them, to have had the best opportunity to know exactly how and where the killing took place. The other witnesses speak only of appearances after the event occurred. According to the testimony of *Cook*, the hogs when struck by the locomotive were on the railroad track, east of the east cow-pit. Had the road been fenced, and the cow-pit been in good condition, it seems to us that the hogs would not have been at this point on the road. Had the evidence established the fact that the hogs were at the crossing of the public highway, when killed, the defendant would not have been liable, except for negligence.

The judgment is affirmed, with ten per cent. damages and costs.

H. C. Newcomb, *J. L. Mitchell*, and *W. A. Ketcham*, for appellant.

H. J. Dunbar, for appellee.

The Otter Creek Block Coal Company v. Raney.

THE COLUMBUS, CHICAGO AND INDIANA CENTRAL RAILROAD
- COMPANY v. STARR.

APPEAL from the Henry Circuit Court.

PERTIT, C. J.—Appellee brought suit against appellant for killing stock by its train of cars, before a justice of the peace. Default, trial, and judgment for appellee; appeal to the circuit court; amendment of complaint; demurrer to it overruled, and exception. This ruling was right. The complaint was in the usual and proper form, and alleged that the killing was at a point where the road was not properly fenced.

Trial by the court, finding and judgment for appellee. The evidence is all in the record, and not only justified the finding and judgment, but clearly required the action of the circuit court as it was given.

Judgment affirmed, with ten per cent. damages and costs.

J. H. Mellett and *M. E. Forkner*, for appellant.

W. Grose and *T. B. Redding*, for appellee.

THE OTTER CREEK BLOCK COAL COMPANY v. RANEY.

PRACTICE.—*Interrogatories to Jury.—Withdrawal of.*—Where particular questions of fact pertinent to the issues and not liable to be rejected as a whole on account of any objection to the character of the interrogatories in which they are embraced have been submitted to the jury, at the request of a party, and without objection from the adverse party, with the proper instruction to the jury in reference to finding thereon, and the jury has retired to consult upon the verdict, the court cannot withdraw said interrogatories from the jury over the objection of the party at whose request they were submitted, on the ground that the court was asked to require the jury to answer them unconditionally, and not upon the condition that they should render a general verdict.

APPEAL from the Clay Common Pleas.

The Otter Creek Block Coal Company v. Raney.

WORDEN, J.—This was an action by the appellee against the appellant on contract. Issue, trial by jury, verdict and judgment for plaintiff.

The point on which we decide the cause is duly preserved and presented by exception.

At the proper time, the defendant submitted to the court twenty-four interrogatories to be propounded to the jury, and asked that the jury be required by the court to return answers to them; thereupon the court instructed the jury as follows, viz.: "The jury can either find a special or a general verdict, but if you find a general verdict for either party, then you must answer the interrogatories here presented by the defendant. If you find a special verdict for either party, then you need not answer the interrogatories."

After the jury had been out fifteen minutes considering of their verdict, on motion of the plaintiff's attorney, the court directed the bailiff of the jury to go to the jury room and get the interrogatories propounded by the defendant and bring them to the court, which was done; and after the jury had been out about ten minutes longer, the court directed them to be brought into court again, which was done, and the court thereupon instructed them as follows:

"Upon further consideration, it has been concluded to withdraw the interrogatories presented to be answered, and it will not be necessary for you to consider them further or return any answer to them, and you may now retire and return either a general or special verdict, as you see fit."

Exception was duly taken to all these proceedings by the defendant. The jury found a general verdict.

The "particular questions of fact" embraced in the interrogatories were germane and pertinent to the issues; at least, the most of them seem to have been. No motion was made to strike out or modify any of them. On the contrary, they were submitted to the jury without objection, and we think they could not have been rightfully rejected as a whole on account of any objection addressed to the character of the interrogatories themselves. But the ruling of the court in

withdrawing them from the jury is sought to be sustained on the ground that the court was originally asked to require the jury to answer them unconditionally, and not upon the condition that they found a general verdict. The court might have rejected them as unconditionally asked, but this was not done. On the contrary, the court required the jury to answer them on the proper condition, namely, that they should elect to find a general verdict. This comes to the same thing as if the court had been asked to require the jury to answer them on the condition named. The interrogatories were rightfully before the jury, with proper instructions to answer them or not, as they should elect to find a general or special verdict, and we think the court erred in withdrawing them from the jury.

The judgment below is reversed, with costs, and the cause remanded.

H. W. Chase and *J. A. Wilstach*, for appellant.

S. Claypool and *J. A. Matson*, for appellee.

ROSENBAUM and Others v. McTHOMAS.

84 331
144 580

BILL OF EXCEPTIONS.—*Affidavit.*—An affidavit in support of a motion to dismiss an action cannot be made a part of the record except by a bill of exceptions.

DAMAGES.—*Nominal.*—A breach of a contract renders the party breaking it liable for at least nominal damages in a suit against him on the contract brought by the other party.

SAME.—*Excessive.*—*Motion for New Trial.*—If excessive damages be not assigned as a cause in a motion for a new trial, such objection is waived.

ATTORNEY.—*Exclusion of.*—An erroneous ruling excluding a person from appearing as an attorney in a cause cannot avail the party for whom said attorney proposed to appear, if excepted to only by said attorney.

APPEAL from the Posey Circuit Court.

WORDEN, J.—This was an action by the appellee, Mc-

Rosenbaum and Others *v.* McThomas.

Thomas, against the appellants, upon a special contract. Issue, trial by the court, finding and judgment for the plaintiff.

Two errors are assigned: first, in refusing to dismiss the action on motion of appellants, based upon the affidavit of Benjamin Lowenhaupt, as set out in the record; second, in refusing to grant a new trial.

The affidavit of Benjamin Lowenhaupt is not in the record; and therefore the question sought to be raised by the first assignment of error is not properly before us. The clerk has, it is true, copied an affidavit of Benjamin Lowenhaupt into the transcript, but that does not make it a part of the record. It should have been made such by bill of exceptions. This point has been so often decided that we deem it useless to cite authorities.

The reasons filed for a new trial were: First. "That the judgment of the court is contrary to law."

Second. "That the judgment is contrary to the evidence."

Third. "That the judgment of the court is contrary to the law and the evidence."

Fourth. "For error of law occurring upon the trial of said cause, in the court refusing to permit William Harrow to appear as attorney for the defendants in the trial of said cause in said court, and excepted to at the time by said defendants."

It may be questionable whether the first three reasons for a new trial should be regarded as having brought anything in review before the court, inasmuch as they are addressed to the judgment of the court, and not to the finding. But we have looked into the proceedings on the trial, including the evidence, and think the finding was in accordance with the law and the evidence, unless it be that the damages may have been assessed at more than we should have put them, had we been trying the cause. The damages (forty dollars) were, however, not greatly, if any, in excess.

The counsel for the appellants insist that the plaintiff was not entitled to any damages whatever. We think it was reasonably shown that there was a breach of the contract sued

upon, on the part of the defendants, and this entitled the plaintiff to nominal damages, at least.

If the defendants deemed the damages assessed too much, they should have embraced that as one of the reasons for a new trial; but not having done so, the objection on that ground was waived. *Kent v. Lawson*, 12 Ind. 675; *Dix v. Akers*, 30 Ind. 431.

The fourth and last reason for a new trial is not alluded to by the counsel for the appellants in their brief. We suppose this is an intentional omission from the fact that the exception taken to the ruling of the court in excluding Mr. Harrow from acting as attorney for the defendants was taken by Mr. Harrow himself.

We quote from the abstract of appellants: "And upon calling said cause for trial, the appellee filed an affidavit and moved the court to prevent William Harrow from appearing as counsel in said cause for the appellants, which motion was sustained by the court; to the sustaining of which the said William Harrow at the time excepted and filed his affidavit and bill of exceptions."

It is quite apparent that any exception taken by Mr. Harrow himself to the ruling of the court, and not for or on behalf of the defendants, can have nothing to do with the case. Suppose Mr. Harrow did, but the defendants did not, except to the ruling. How, in such case, could an erroneous ruling avail the defendants? As to them, it stands like any other ruling to which no exception is taken. The fact that at the time the exception was taken Mr. Harrow was excluded from acting for the defendants, excludes any implication which might otherwise arise that the exception taken by him was on behalf of the defendants.

We find no error in the record for which the judgment ought to be reversed.

The judgment below is affirmed, with costs.

E. M. Spencer and *W. Loudon*, for appellants.

J. H. Laird and *J. Brownlee*, for appellee.

Johnson and Another v. Crossland and Others.

JOHNSON and Another v. CROSSLAND and Others.

84 334
124 60

PROMISSORY NOTE.—*Attorney's Fees.*—*Joinder of Causes.*—*Parties.*—Where a promissory note provides for the payment of attorney's fees if suit be instituted thereon, attorney's fees may be recovered in an action on the note, by the person entitled to sue for the debt; and the attorney for whom such fees are claimed need not be made a party plaintiff, though the fees have not been paid before the institution of the suit.

APPEAL from the Hendricks Circuit Court.

DOWNEY, J.—This was an action by the appellees against the appellants on a promissory note for the payment of a specified sum of money, with interest, and attorney's fees, if suit should be instituted on the note.

There was a demurrer to the complaint on the grounds, first, that the complaint did not state facts sufficient to constitute a cause of action; second, that there was a defect of parties plaintiff, the attorney who claims fees should be a party plaintiff by name; third, that several causes of action have been improperly joined in said complaint; fourth, that the plaintiffs have not legal capacity to sue.

This demurrer was overruled by the court; the defendants caused the proper exception to be entered, and declining to make any further defense, final judgment was rendered for the plaintiffs.

Two specifications are made in the assignment of errors: first, the court erred in overruling the demurrer to the complaint; second, in giving judgment for the plaintiffs below as to twenty dollars, attorney's fees.

In his brief, the counsel for the appellants contends that the sum demanded for attorney's fees could not legally be collected in favor of the plaintiffs without an allegation in the complaint that the plaintiffs had before suit was brought paid the attorney's fees, otherwise the attorney of the plaintiff should have been a party plaintiff; and also that two causes of action were improperly joined, there being a cause of action for the plaintiffs to recover the debt, and another for the attorney to recover the amount of his fee.

John v. John.

None of these positions can be maintained. The attorney's fee was recoverable by the plaintiffs, and was a part of their cause of action, and was not a cause of action in favor of the attorney who might be retained by the plaintiffs to bring the suit. Nor was it contemplated or necessary that the plaintiffs should have paid the attorney's fee before the suit was brought. The contract contemplated the assessment of the amount for attorney's fee and the recovery thereof with the amount of the debt mentioned in the note and as a part of the plaintiffs' damages.

But no question, except perhaps the one relating to the improper joinder of causes of action, is properly presented to us. The demurrer was to the whole complaint, and no pretence is made that the plaintiffs were not entitled to recover the sum mentioned in the note aside from the attorney's fee. Nor was any question made as to the amount of the recovery by motion for new trial in the circuit court.

The judgment is affirmed, with ten per cent. damages and costs.

W. A. McKenzie, for appellants.

L. M. Campbell, for appellees.

JOHN v. JOHN.

APPEAL from the Wayne Common Pleas.

PETTIT, C. J.—The errors assigned are, "first, the court erred in permitting said appellee to amend said complaint by inserting said charges of adultery, accruing after said complaint was filed, and overruling said appellant's motion to strike out said amendment; second, the court erred in allowing excessive alimony; third, the court erred in overruling said demurrer to said amended complaint; fourth, the court erred in overruling said motion for a new trial."

John v. John.

It is impossible to conceive a more awkward, imperfect, irregular, disorderly, and worthless transcript than this. It is difficult, with few exceptions, to tell what was or what was not done by the court or parties, as there is no system in the record. We have been only able to *guess*, that the appellee filed a complaint for divorce and alimony against the appellant, charging adultery; that a general denial and an answer of condonement were filed, and without any action thereon, appellee took leave to amend the complaint, which was done by filing additional or supplementary causes of divorce, charging adultery *after* the commencement of the suit, adulterous intercourse, cruel treatment, failure to provide, &c. Motion to strike out, demurrer, and affidavit for continuance were filed at the same time. On these the action of the court is so jumbled up in the record that it is not clear what was done, except a continuance, whether on the affidavit or not is not clear by the record. After numerous motions, orders, and affidavits, and but few rulings of the court, the cause was submitted to the court for trial. Finding for appellee, and that appellant was guilty of adultery as charged in the complaint; that the parties had lived together twenty-seven years and had accumulated about twelve thousand dollars (mostly from the wife's property); that she had real property at the date of the decree to the amount of three thousand dollars; that he had in his own name property worth nine thousand dollars; and the court decreed her alimony of three thousand dollars, payable in instalments.

The evidence is not before us, but we have examined what purports to be the record in the cause as critically and carefully as it is possible to do, and we cannot say that there is any error that the appellant has a right to complain of, or that ought to reverse the decree.

Judgment affirmed, at the costs of appellant.

W. A. Bickle, for appellant.

L. D. Stubbs and *J. Varyan*, for appellee.

HUGHES v. SELLERS and Others.

84	337
130	106
34	337
146	248

HIGHWAY.—Location of.—Petition.—A petition to the board of county commissioners for the location of a public highway must give the names of the owners and occupants or agents of all lands over which the proposed road is to run; and it is not a sufficient designation of such owners to say that they are the heirs of a person named. An objection to the petition because of its failure to give such names or a portion of them is not waived by the failure to make it before said commissioners, but may be raised by motion in arrest of judgment on appeal to the circuit court.

SAME.—Viewers.—Report of.—In a proceeding before the board of county commissioners to locate a public highway, the report of the first viewers appointed is insufficient if it do not show that they have laid out and marked the highway, and, when it runs upon the line dividing the lands of different proprietors, that they have so laid it out that each adjoining owner shall give half of the road; and second viewers, appointed upon remonstrance being made, have no authority to lay out and mark the highway.

GUARDIAN AND WARD.—Guardian Ad Litem.—Practice.—Where the guardian of a defendant appears and defends for his ward, it is unnecessary for the court to appoint a guardian *ad litem*.

APPEAL from the Hendricks Circuit Court.

DOWNEY, J.—The appellees filed a petition before the board of commissioners, as follows:

“State of Indiana, County of Hendricks, ss.

“To the Board of Commissioners of Hendricks County:

“The undersigned, residents of Hendricks county, and freeholders therein, respectfully petition the honorable board of commissioners aforesaid for the location of a public highway in said county, as follows: commencing at the north-east corner of B. N. Mobely’s land, in section thirty, township sixteen, north of range one east; thence running north between the lands of James Smith on the west, and the lands of Hiram Mitchell and A. F. Smith and Richard B. Jones on the east, to the north-east corner of James Smith’s land; thence west eleven rods; thence north between the lands of E. D. Sellers and the heirs of Jeremiah Depew, to the north-east corner of said heirs’ land; thence west two rods; thence north between the land of Henry Hughes’ heirs, to intersect

Hughes v. Sellers and Others.

the Danville and Brownsburg road; said road being a public necessity and of public utility, as your petitioners believe." Signed by twelve persons.

Upon proof of notice, viewers were appointed, who subsequently reported that they had viewed the said described highway, as follows, to wit: giving the same description as in the petition, "and are of the opinion that the location of said described highway would be of public utility."

There was a motion made by the appellant to set aside this report, which was overruled.

Upon remonstrance by her, other viewers were appointed, who reported in favor of the utility of the highway, and that they had *laid it out thirty feet wide*, describing it as in the petition.

The appellant then remonstrated, claiming damages, and reviewers were appointed, who reported, fixing the amount of her damages. The damages having been paid to the county treasurer, the commissioners ordered the highway opened.

The appellant appealed to the circuit court, where she moved to dismiss the petition because it did not sufficiently fix the beginning and termination of the proposed highway.

This motion was overruled. The appellant then presented the same objection to the first report that was made before the commissioners, for the reasons, among others, that the said viewers were not sworn, and did not lay out and mark the proposed highway; but the court refused to entertain and consider the said objections. The court, having heard the evidence, found that the proposed highway sought to be established and located by the petitioners would be of public utility, and re-assessed the damages, and found that the same had been deposited with the treasurer for the defendants.

There was a motion for a new trial for the reasons, first, that the court improperly overruled the motion of the defendant to dismiss the plaintiffs' petition for a highway; second, the court improperly refused to entertain and consider the original objection in writing made by the defend-

ant to the board of commissioners receiving and acting on the report of the first set of viewers, and to strike out said report.

This motion was overruled. The defendant then moved in arrest of judgment, because, first, the petition for the highway was not sufficient in law to form the basis of action of the board of commissioners; second, because the petition was not sufficient in law for that court to render a valid judgment on, establishing and creating a public highway; third, because the report of the first viewers was not sufficient in law on which to render a valid judgment establishing a highway on the route set forth in said report, on which route the court had found a highway would be of public utility.

This motion was also overruled by the court, and judgment was rendered that the highway be laid out thirty feet wide, on the route as described in the petition, &c. To all these rulings of the court exceptions were duly taken by the defendant.

The errors assigned are, first, the refusal of a new trial; second, refusing to arrest the judgment; third, rendering judgment against the defendant without appointing a guardian *ad litem* for her.

The first question presented, in the natural order, for our consideration, is as to the sufficiency of the petition, as that is at the foundation of the proceeding. The *termini* of the proposed highway are not very well fixed; but there is, we think, another, and perhaps more serious, objection to the petition, which is that it does not give the names of the owners, occupants, or agents of the lands through which the highway passes, as required by 1 G. & H. 359, sec. 1. Literally construed, the petition proposes to do an impossible thing; that is, lay out a highway *between* the lands of two adjoining proprietors. We must understand it as proposing to run the highway through the lands of the persons named, but on the line dividing their lands, so that, according to the statute, each shall give half of the road. 1 G. & H. 363, sec. 16.

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It should, then, have given the names of these owners; and it is not giving the names of the owners, to say that they are the heirs of a designated person, as is done with reference to two or more of the tracts of land over which this highway is to run.

This objection was not waived because it was not made before the board of commissions. "We are of opinion that if the petition was so insufficient as to form no basis for the action of the board, an objection thereto would be fatal at any stage of the proceeding." *Hays v. Campbell*, 17 Ind. 430.

We know of no other standard by which to measure the sufficiency of the petition than that which is to be found in the statute providing what it shall contain. 1 G. & H. 359, sec. 1; *Hays v. Campbell, supra*.

Though it may be unnecessary, we will say that we think the report of the first viewers was defective and insufficient, because it did not show that they had laid out and marked the highway, nor that they had laid it out so that each adjoining owner should give half of the road, as required by 1. G. & H. 363, sec. 16.

We also think that the second viewers appointed had no authority to lay out and mark the highway. Their duty was simply to examine the proposed highway and report whether or not it would be of public utility. 1 G. & H. 364, sec. 23

The highway having never been properly laid out and marked, by the viewers, we do not see how the circuit court could adjudge it to be opened and established as such.

There is nothing in the last error assigned. The appellant was represented by her guardian, before the commissioners and in the circuit court. It is a part of the duties of the guardian to appear for and defend, or cause to be defended, all suits against his ward. 2 G. & H. 567, sec. 9, fifth division. Where the guardian appears, it is unnecessary for the court to appoint a guardian *ad litem*.

The judgment is reversed, with costs, and the cause re-

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manded, with directions to the circuit court to sustain the motion in arrest of judgment.

C. Foley, for appellant.

J. S. Ogden and *J. V. Hadley*, for appellees.

CLEM v. MARTIN.

CONTRACT.—Custom.—Landlord and Tenant.—A stipulation in a lease of land for farming that the crop when harvested shall be divided according to the custom prevailing among the farmers of the neighborhood in which the land is situated, is valid.

34	341
138	669

BILL OF EXCEPTIONS.—Motion to Strike Out.—The action of the court in overruling a motion to strike out a paragraph of a pleading will not be reviewed by the Supreme Court, if the question be not presented by a bill of exceptions.

SAME.—Objection to Evidence.—An exception to the admission of evidence over objection cannot be made available in the Supreme Court, if the bill of exceptions do not show that a ground of objection was stated to the court below and what the ground of objection was.

APPEAL from the Warren Common Pleas.

BUSKIRK, J.—The appellee brought his action in the court below against the appellant to recover damages for an alleged violation of a contract. The complaint alleges, that the appellant, in March, 1868, rented to the appellee, for that year, twenty-one acres of land for corn, and nine acres for wheat; that the appellee was to furnish the seed wheat; that the appellant was to furnish horses, and the necessary farming implements, and a house for the appellee to reside in; that the wheat when harvested was to be divided according to the custom prevailing among the farmers of that neighborhood; that the appellee was to deliver to the appellant, in his cribs on the said farm, two-thirds of all the corn raised on the said corn land; that the appellee moved into the said house, and sowed the nine acres of wheat; that the appellant furnished to the appellee the horses and farming

Clem v. Martin.

implements agreed upon, soon after he moved into the said house on the said farm; that after the said wheat had been sowed, the appellant without the knowledge or consent of the appellee took possession of and removed the said horses and implements, and refused to permit the appellee to cultivate the said twenty-one acres in corn, by which he had been damaged.

The appellant moved to strike out of the complaint all that referred to the custom in the neighborhood where the land was situated, as to the rent of land to be cultivated in wheat. The motion was overruled and excepted to. This is assigned for error. We are referred to *Harper v. Pound*, 10 Ind. 32, as an authority in point. We do not so regard it. In that case, it was offered to prove by the local usage of that locality what was meant by the words "to clear," as used in the contract sued on. This court correctly held that this could not be done. The case under consideration presents a very different question. In this case the parties referred to and incorporated into their contract, and made a part thereof, the usage that prevailed among farmers in that locality.

We admit that a plain and express contract cannot be contradicted, varied, explained or modified by the custom prevailing in any particular locality; but this does not prevent parties from making the usage of a particular locality a part of their contract, and agreeing that they will be governed thereby, provided such usage is not "in conflict with the settled rules of the law, and does not go to defeat the essential terms of the contract." *Wallace v. Morgan*, 23 Ind. 399; *Atkinson v. Allen, Adm'r*, 29 Ind. 375.

In the case under consideration, the usage that by the agreement of the parties entered into and became a part of the contract did not conflict with the settled rules of the law, and was not offered to defeat, but to support, the essential terms of the contract. The court below committed no error in overruling the motion to strike out.

The appellant demurred to the complaint. The demurrer

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was overruled and excepted to. This is assigned for error. The only objection urged to the complaint is the custom therein mentioned. This is no ground of demurrer. The ruling of the court on the demurrer was correct.

The appellant filed an answer in four paragraphs. There was a motion to strike out the second, third, and fourth, which was overruled, but the question is not presented by bill of exceptions, and is not available here. There was a demurrer filed to the second, third, and fourth paragraphs of the answer, which was overruled and excepted to, but there is no assignment of cross errors, and the question cannot be considered.

There was a jury trial; finding for the appellee; motion for a new trial by appellant, which was overruled and excepted to. The third reason assigned for a new trial was the admission of incompetent evidence. The question was reserved by a bill of exceptions. The bill of exceptions states, that "the plaintiff proposed to prove as an element or circumstance in arriving at the damages in said case, the fair rental value of the land in the complaint mentioned, per acre, for the cropping season of 1868, in the community where situated. But the defendant objected to this mode of proof as an element or circumstance to be considered in arriving at or assessing the damages for the breach of the contract sued on." The bill of exceptions says, that the appellant objected to this evidence, but it does not inform us how, in what manner, or for what reasons, he objected. No reasons were pointed out to the court below. It is well settled by repeated decisions of this court that a general objection to evidence is not sufficient. The objections must be pointed out and the attention of the court specially called to them. The judge in the midst of a trial cannot be expected to delay the trial to hunt up the objection. Upon this point we refer to the following decisions of this court, and the list might be greatly extended. *Russell v. Branham*, 8 Blackf. 277; *Galbreath v. Doe*, Id. 366; *Carter v. Hanna*, 2 Ind. 45; *Adkins v. Holmes*, Id. 197; *Blasingame v. Blasingame*, 24 Ind.

Uland, Guardian, v. Carter and Others.

86; *Ammerman v. Crosby*, 26 Ind. 451; *Board of Com'rs, &c., v. Boynton*, 27 Ind. 19; *Briggs v. McCabe, Id.* 327.

The bill of exceptions presents no question for the review and decision of this court as to the competency of the evidence that was objected to.

The evidence is in the record, and we are urged to reverse the judgment upon the weight of the evidence. We have examined the evidence with care, and are of the opinion that the verdict of the jury was fully supported by the evidence. We think the court did right in overruling the motion for a new trial.

The judgment is affirmed, with costs and five per cent damages.

B. F. Gregory and *J. Harper*, for appellant.

L. T. Miller, for appellee.

ULAND, Guardian, v. CARTER and Others.

34	344
180	429
34	344
152	163
34	344
153	90

AMENDMENT.—*Entry Nunc Pro Tunc*.—*Guardian's Sale*.—Motion in the court of common pleas by a guardian for an entry *nunc pro tunc*, after five years, in the record of a proceeding brought by him in said court for the sale of certain real estate of his ward, so that said record would show the filing of an additional bond by the guardian, the order of sale, the deed, and approval thereof, these portions of the proceeding not being shown by the record. On appeal, the Supreme Court, upon the evidence, showing cotemporaneous data, consisting of papers in the case by which to amend the record in these particulars, ordered the court below to make said entry.

SAME.—On such a motion the court cannot decide upon the validity of the title under such guardian's sale, but can only order the entry to be made, or refuse it.

APPEAL from the Greene Common Pleas.

DOWNEY, J.—The appellant, at the January term, 1870, of the common pleas, filed in said court a written motion, representing that at the January term, 1865, of said court, he,

Uland, Guardian, v. Carter and Others.

as guardian of Elizabeth Uland, Cary Uland, Eliza Uland, John Uland, and Clementina Uland, filed a petition to sell the interest of said wards in certain real estate described in said motion; that upon the filing of said petition, the court appointed appraisers to appraise said land, who, after being sworn, reported their appraisement to the court, and thereupon the court required said guardian to execute an additional bond with sufficient freehold surety, which said guardian did, and said bond was approved by the court and filed; that thereupon said court ordered said lands to be sold at private sale for cash in hand without notice; that at said term of said court, said guardian sold said land to Michael Tubby, and reported said sale to said court, and said sale was confirmed by said court, and said court ordered said guardian to execute to said purchaser a deed for the same, which was executed by said guardian and reported to said court, and said court examined and approved the same; and said deed with the indorsement of the clerk and judge of said court thereon are made part of the motion.

Whereupon he moved the court for an entry, *nunc pro tunc*, in said case, showing the filing of said bond, the order of sale, the report of sale, and deed, and approval thereof, the record in said cause as it then stood not showing said orders.

The defendants, having been notified, appeared, and the matter was, by agreement, submitted to the court for trial. The court, without any request, found specially, first, the filing of the petition on the 17th day of January, 1865, setting out the petition; second, that on the 20th day of January, 1865, the petition was submitted to the court for hearing, and the court appointed appraisers; that on the same day the appraisers made their report, setting the same out; third, that on the same day the guardian filed with the clerk his additional bond, which is also set out, marked approved *by the court* on the same day; that on the same day the guardian filed with the clerk of said court the deed, which is also set out, and which recites the filing of the petition, the appointment of the appraisers, the return of the appraisement, the or-

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der of the court to sell at private sale for cash in hand, the sale to Tubby at private sale for the appraisement, the confirmation of the sale, and order for the execution of the deed. This deed was acknowledged by the guardian in *open court*, and certified by the clerk. It was also indorsed, "examined and approved in open court, January 20th, 1865," and signed by the judge.

The judge further states in his finding, that the records or minutes of said court do not show that there was an order made for the sale of said land, nor for the filing of the above named bond, a report of the sale of said lands, or the filing of said deed, but said deed was indorsed by the judge as above.

The judge then says, "Upon the foregoing facts, the court comes to the following conclusions of law: That the sale was illegal and void, for the reasons that no order was ever made by the court for the sale of said land, and that no notice was ever given of such sale as required by law in force at the time of such sale. The court therefore refuses to correct the record as required in the motion of the plaintiff, and finds for the defendant."

There was a motion for a new trial overruled. The evidence is set out in a bill of exceptions, and consists of the petition, order of the court appointing the appraisers, appraisement nineteen hundred and eighty dollars, the additional bond, the deed and indorsements on the same; also the affidavits of James Uland and E. E. Rose, stating that after the filing of the appraisement, the guardian filed an additional bond, that thereupon the court ordered the sale of the land at private sale, without notice; that the guardian sold the same in pursuance of the order, reported the sale, and was ordered to make the deed, which he accordingly did, and which was examined and approved by the court.

We think the judgment of the court ought to be reversed. The court had but one thing to do, either to direct the entry to be made, or to refuse it. The court was not called upon

to decide the question with reference to the title to the land, whether it was good or bad.

That part of the court's finding in which it states that the records or minutes do not show that there was an order of sale, nor for the filing of the bond, report of the sale of the land, or the filing of the deed, is simply a repetition of the defects in the record mentioned in the motion, and which it was desired to supply.

Having the evidence before us, if we exclude the affidavits used and set out in the bill of exceptions, which we need not do, for they were not objected to in the common pleas, we think it sufficiently appears therefrom that the bond was filed and approved by the court, for it is so certified at the bottom of the bond. Also, that the order of sale was made at private sale, for cash; the sale made; reported to, and approved by, the court; and deed ordered made; for all these are recited in the deed which the judge certifies he had "examined and approved in open court;" also that the deed was so reported, examined, and approved. We think it should not be stated in the entry that the sale was to be made without notice. None of the papers show that such an order was made, nor, perhaps, did any law authorize it. 2 G. & H. 572, secs. 19 and 22; 3 Stat. of Ind. 139, secs. 1, 2. But whether such notice was necessary to the validity of the sale or not, we do not decide.

In this case, the petition was filed on the 17th of January, 1865. All the other steps took place on the 20th day of January, 1865, and were simultaneous acts. According to the authorities cited in *Makepeace v. Lukens*, 27 Ind. 435, amendments are allowed only when the case is within the reach of some statute, or where there is something to amend by, that is, where there is some memorial paper, or other minute of the transaction in the case, from which what actually took place in the prior proceeding can be clearly ascertained and known. It is then said that in every case cited by Mr. Tidd, in his Practice, where amendments have been permitted under the English statutes, a subsequent paper, pleading, order or

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proceeding, in the progress of the cause, has been corrected by something in the record or proceeding of a prior, *or at least equal*, date, with the matter in which the error is sought to be amended.

The judgment is reversed, with costs, and the cause remanded, with directions to make the entry as prayed for in the motion, omitting the words "without notice."

BUSKIRK, J., having been of counsel, was absent.

W. M. Franklin, for appellant.

S. H. Buskirk, J. R. Isenhour, and J. W. Baker, for appellees.

RICKETS and Another v. HITCHENS and Another.

JUDGMENT.—*Effect of Granting New Trial.—Injunction.*—The granting, unconditionally, of a new trial in a cause as effectually vacates a judgment previously rendered therein as if the judgment were set aside in express terms; and an injunction will lie to prevent the collection of such judgment.

APPEAL from the Switzerland Circuit Court.

WORDEN, J.—Complaint by the appellants against the appellees, to restrain the service of a certain writ of *venditioni exponas*, issued upon a judgment alleged to have been set aside and vacated. The complaint was held bad on demurrer, and judgment rendered for the defendants. Exception.

The facts appearing from the complaint are, briefly, these. At the November term, 1862, of the Switzerland Circuit Court, Hitchens, one of the appellees, recovered a verdict and judgment in that court, against the appellants, Rickets and Sturgeon, for the sum of five hundred dollars. A part of their judgment was afterwards assigned to the appellee Dumont.

On the 11th of December, of the same year, the appellants filed their complaint, in the same court, against the appellees herein, to set aside said judgment and obtain a new trial of

the cause wherein it was rendered. A demurrer was subsequently sustained to the complaint, and judgment rendered for the defendants therein. This judgment was afterwards reversed by this court, and the cause remanded, &c. The case is reported in 22 Ind. 107. After the opinion and judgment of this court was sent down, the original cause was docketed, and the opinion of this court was spread upon the order book of the court below; then follows this entry, viz.: "It is therefore considered by the court that a new trial of this cause be granted." This entry could have had reference to no other case. Afterwards, the parties to the original cause appeared, and by agreement it was continued; and still later the plaintiff in the original cause procured an attachment for witnesses therein. Subsequently, the parties appeared in the original cause, and on the defendants' motion, it was dismissed for want of a sufficient cause of action; and still later a motion by the plaintiff therein to set aside the order dismissing said action was overruled.

The execution sought to be enjoined was issued on the five-hundred-dollars judgment above mentioned, and it is averred that the sheriff has advertised for sale thereon the property of one of the appellants, and will sell the same unless restrained. Prayer, that the sale be enjoined, and that the appellees be restrained from enforcing said judgment, and for other relief.

We are not advised upon what ground the court below held the complaint bad, there being no brief for the appellees in the case. We do not discover any defect in the complaint, and are of opinion that the judgment below is erroneous and will have to be reversed.

If the proposition be assumed, that the order by which a new trial was granted in the cause did not operate to set aside the judgment, we cannot assent to it.

The granting, unconditionally, of a new trial in a cause, as effectually vacates a judgment previously rendered therein as if the judgment were set aside in express terms. This is so self-evident a proposition that authorities in its support

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are unnecessary. We cite, however, as in point, the case of *Robideau v. Ewing*, 5 Blackf. 552.

When the opinion of this court holding the complaint for a new trial to be good went down to the court below and was spread upon the order book, an issue of fact might have been made, and proof required of the matters stated in the complaint as grounds for a new trial. This, however, was not done, but the order was at once made granting the new trial, as above shown. This order was not only not objected to, but was acquiesced in by the parties, who subsequently appeared and took steps in the cause as one pending.

The judgment having been thus, in effect, set aside, it became wholly inoperative, and no execution could be properly issued upon it.

We are also of opinion that a proceeding to enjoin the collection of the judgment was a proper remedy. *Collins v. Fraiser*, 27 Ind. 477.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

DOWNEY, J., having been of counsel in the cause, was absent when it was considered.

A. C. Downey and *S. R. Downey*, for appellants.

J. W. Gordon, for appellees.

JARBOE and Another v. SCHERB.

OPEN AND CLOSE.—Where in an action on a promissory note the general denial is pleaded in answer, the plaintiff has the right to open and close.

APPEAL from the Clay Common Pleas.

DOWNEY, J.—The alleged errors in this case are, first, the refusal to grant the defendant a new trial; second, refusing permission to the defendant to file a paragraph of payment

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after the issues were closed; third, not allowing the defendant to open and close; fourth, in giving and refusing instructions.

The action was brought by Scherb against Jarboe and Brown, as partners, on a promissory note; and also for the price of personal property sold and delivered.

Answer, first, the general denial; second, to the first paragraph of the complaint, that the note was given for the price of a horse warranted to be "a good horse, and all right, that is, meaning and intending to, and did, warrant him to be sound in every respect;" that he was not a good horse, nor all right in every respect, at the time of the sale and execution of the note, but was affected with a disease, the name of which was unknown to the defendants, which injured him in the loins and hind legs and otherwise, and rendered him of little or no value, to the damage of defendants two hundred dollars. They also allege an offer to return the horse on discovery of his defects, and offer to set off their damages against the note, and pray judgment for the overplus; third, a set-off for eighty dollars for keeping the horse, as per bill of particulars filed.

Reply in denial of the second and third paragraphs of the answer.

Trial by jury. Verdict for the plaintiff. Motion by the defendants for a new trial for the reasons, "first, the court erred in giving instructions by the court numbered 1, 2, 3, 4, 5, 6, 7, and 8; second, in refusing 1, 2, 3, 4, 5, 6, and 7, asked by the defendants; third, in refusing to allow the defendants to put in a plea of payment, &c.; fourth, in not allowing the defendants to prove payment, except upon the condition of *payment*, under the general denial; fifth, in not allowing the defendants to open and close; sixth, in admitting illegal evidence; seventh, in refusing legal and proper evidence."

This motion was overruled, and judgment rendered on the verdict. The evidence is not in the record, by bill of exceptions, but the instructions are copied.

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1. The merits of the application of the defendants for leave to file an answer of payment after the issues were closed, depend alone on a misunderstanding between the counsel of the defendants as to what should be pleaded. One of them had read the complaint, the other had not. There was no error in refusing to allow the answer to be filed. But this matter was rendered immaterial by matter occurring afterwards. While the court was announcing its opinion on this point, the plaintiff offered to enter into an agreement to allow proof of payment under the general denial, but the defendants informed the court that as the burden of the proof would be on them any how, they wished to strike out the general denial; but the court gave the defendants to understand that a plea of payment could not be put in, and that the defendants might avail themselves of proof of payment under the general denial and the offered agreement of the plaintiff; and thereupon the parties made and executed the following agreement: "The plaintiff agrees that the defendants may introduce under the pleadings, as they now stand, all evidence they may have of payment of the claim set up in the second paragraph of the plaintiff's complaint."

2. After the plaintiff had closed his evidence, and the defendants began to make proof of payment of the claim contained in the second paragraph of the complaint, the plaintiff admitted that the said claim had been paid. The defendants then admitted the execution of the note sued on, and asked leave to open and close the case. This was refused.

This was right. The admission of the execution of the note amounted to nothing. Its execution was not denied. The general denial being in, the plaintiff had the right to open and close. *Howard v. Cobb*, 6 Ind. 5.

3. We have examined the instructions given, and those refused, which are referred to in the assignment of errors, and we think that those which were given express the law correctly, and that those refused were only requests for a repetition to the jury of what had already been said, or ought

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not to have been given. There was no reason for a new trial.

The judgment is affirmed, with five per cent. damages and costs.

S. Claypool, G. A. Knight, and G. P. Stone, for appellants.

DEARDORFF v. ULMER.

REPLEVIN.—*Justice of the Peace.—Bond.*—In an action of replevin commenced before a justice of the peace, if the bond filed by the plaintiff be for a sum less than double the value of the goods as stated in the verified complaint, the justice has no jurisdiction of the action; and on appeal to the court of common pleas such defect of the bond constitutes good ground for a motion by the defendant to dismiss the action, or to arrest the judgment.

APPEAL from the Knox Common Pleas.

BUSKIRK, J.—This was an action to recover the possession of two cows, commenced by the appellee against the appellant, before a justice of the peace. The appellant appeared before the justice, and moved to dismiss the suit, for the reason that there was no valid and legal bond filed by the plaintiff, before the writ was issued. The motion was overruled. There was a trial before the justice, resulting in a finding and judgment for the plaintiff. The defendant appealed to the common pleas court, in which court he renewed his motion to dismiss the action, because there was no such bond as was required by the statute. The motion was overruled, and an exception taken to such ruling. There was a trial by jury; verdict for plaintiff; motion for a new trial made and overruled, and an exception. The appellant then moved in arrest of the judgment, which motion was overruled, to which ruling the appellant excepted.

The appellant has assigned and argued two errors. The

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first is, the refusal of the court to dismiss the action in consequence of the insufficiency of the bond; and the second is, the action of the court in overruling the motion in arrest of judgment. Both motions were based upon the insufficiency of the bond, and the only question presented for our decision is as to the validity of the bond. The only objection urged to the bond is, that it is in the penal sum of one hundred dollars, and not in double the value of the property replevied. The affidavit charges the property to be worth seventy dollars, and the court found that the two cows were of the value of seventy dollars.

This action is based upon section seventy-one of the justice's act, 2 G. & H. 598. This section reads as follows: "Whenever any plaintiff shall, by complaint in writing, verified by affidavit, set forth that his personal goods, not exceeding in value one hundred dollars, have been wrongfully taken, or are unlawfully detained by any other person, specifically describing such property, giving the value thereof, and alleging that the same has not been taken by virtue of any execution or other writ against him, or if so taken, that the same is exempt from execution by virtue of the laws of this State, and claiming damages for the detention or taking the same, not exceeding one hundred dollars in addition, and shall file with such justice a bond with surety, to be approved by such justice, and payable to the defendant *in a sum double the value of such goods*, conditioned that he will prosecute such complaint to effect, and return such goods to such defendant, if judgment of return be awarded to him, and pay all damages awarded such defendant, *the justice shall issue to some constable of the county* his writ, commanding him to take the property described and deliver it forthwith to such plaintiff, and that he summon said defendant to appear at a time and place therein named before such justice to answer such complaint."

It seems quite clear to us, that the filing of the complaint in writing, and verified by affidavit, and the bond as required in the above section are necessary to confer jurisdiction upon

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the justice; and until these things have been done, the justice possesses no power to issue the writ; and if a writ were issued without a complaint or a bond, it would be illegal, and would constitute a good and sufficient cause for the dismissal of the action. The object of the statute is to secure the defendant, in an action of replevin, in, either a return of the property, or compensation therefor, if a return should be awarded, and also in the payment of the costs and damages. The *validity* of the bond depends upon whether it conforms substantially to the requirements of the statute. The above section in plain and express terms provides that the bond shall be "payable to the defendant in a sum double the value of the goods." The complaint alleged that the cows were of the value of seventy dollars. The bond should have been in a sum double the alleged value. It is not necessary for us to decide, and we do not decide, whether the bond in the case under consideration is absolutely void because it is not in a sum double the value of the property described in the complaint; but, conceding that a recovery could be had to the amount of one hundred dollars, it was insufficient to secure the defendant, if the cause had been decided in his favor. It is a well settled rule, that courts of inferior and limited jurisdiction possess no power or authority except such are conferred by the statutes, and they must be strictly followed, or their acts will be illegal and void, unless the defect is waived by the defendant. The only safe course for a justice of the peace is, to read for himself the statute, and then to strictly pursue its requirements. If this were done, litigants would be saved from paying immense sums in costs, and the courts from correcting their errors. But many of our justices are too much disposed to blindly follow some form, which may have been prepared for a different law and to suit a different state of facts. The laws are frequently changed by our legislature, while our books of forms remain unchanged.

We are of opinion that the court below erred in overruling the motions to dismiss, and in arrest of judgment.

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The judgment is reversed, with costs, and the cause remanded, with directions to the court below to arrest the judgment.

J. C. Denny and G. G. Reiley, for appellant.

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DAYTON v. FISHER, Administrator.

HUSBAND AND WIFE.—*Wife's Separate Property.*—Where a man invests his wife's money in land, and, without her knowledge or consent, takes the deed therefor in his own name, and afterwards sells such land, she is entitled to the entire sum received therefor.

SAME.—*Estoppel.*—*Decedents' Estates.*—Where a man dies seized of land purchased in part with his own money and in part with money belonging to his wife, the deed being taken in his name without her knowledge or consent, she is entitled to recover from his estate the amount of her money so invested; and in the prosecution of such claim against said estate she will not be estopped by the facts that she attended a sale, made by the administrator of said estate under an order of the proper court, of two-thirds of said land, and did not make any objection to such sale, but herself bid thereat, and that in an action by the purchaser at such sale against her for partition of said land, she set up her claim to an interest in said land beyond her one-third thereof as widow, because of its purchase with her money in part, and her claim to such equitable interest was disallowed, and partition was awarded without regard thereto.

APPEAL from the Posey Common Pleas.

WORDEN, J.—Jane Dayton, the appellant, filed her claim in the court below, against the appellee, administrator of the estate of Jesse Dayton, deceased, for the sum of six hundred and twenty-five dollars, being the proceeds of forty acres of land, bought with her separate money, and the deed taken, without her knowledge or consent, in the name of her husband, the said Jesse, which land the said Jesse sold and conveyed to Thomas G. Fisher for the sum above specified, and which money the said Jesse, without her knowledge or consent, used as his own, and invested in other lands in his own

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name without her knowledge or consent, agreeing and intending to repay said sum of money to said Jane, or to invest the same for her in property in her own name.

The defendant answered, first, by general denial; second, admitting that the forty acres of land were purchased with the plaintiff's money, and alleging that the proceeds of the sale thereof to Fisher were invested by said deceased, together with other funds of his own, in other lands in said county, and described in the answer, and that he died seized thereof; that afterwards said administrator, on proper notice and proceedings therefor, procured an order, in the Posey Court of Common Pleas for the sale of the two-thirds of said land, and afterwards sold and conveyed the same to Leonard H. Floyd and John B. Gardiner; that the plaintiff attended the sale and bid on the land, claiming no interest therein and making no objection to the sale; that afterwards Floyd and Gardiner filed their complaint in the same court against said Jane, for the partition of said land, to which she answered, avering that the whole purchase-money for the land was seventeen hundred dollars; that of this sum her husband used six hundred and twenty-five dollars belonging to her, and she claimed an equitable interest in the land to the extent of the proportion of her money invested in it, and one-third of the residue. Floyd and Gardiner replied to this by general denial, and by setting up the facts of her attending the sale and bidding on the land as an estoppel. On these issues the cause in partition was tried, and said Jane found and adjudged to be the owner of one-third only of the land, which was set off to her. The record of the partition suit is set out.

To the second paragraph of the answer, the plaintiff demurred, but her demurrer was overruled, and she excepted, and declining to reply thereto, final judgment was rendered against her.

We have not been favored with any brief for the appellee, and are, therefore, not advised upon what ground it is claimed

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or was held, that the paragraph of the answer demurred to is good. In our opinion, it is radically bad.

If the deceased invested Jane's money in land, and took the deed in his own name without her knowledge or consent, and afterwards sold the land, she was entitled to the sum received therefor, however much more it may have been than the sum originally invested. If he thus received the sum of six hundred and twenty-five dollars, she has a just claim for that amount.

If he again invested that sum of hers in land, taking the deed in his own name, such investment would not discharge his obligation to her. The debt would still be due her. She might, under some circumstances, follow the money into the land, and hold an interest in it, proportional to the amount of her money invested, as a resulting trust. But the fact that she has sought to establish a trust in the land, and failed therein, is no reason why she may not maintain an action for the money. There are many reasons that would prevent the establishment of the trust, especially where the property has passed into the hands of third persons, that would not prevent a recovery of the money. A party whose money is invested in lands by another in fraud or breach of trust, is not bound to take the land, or insist on his lien, but may demand payment of the money. 2 Story Eq. § 1211, and note. Therefore the plaintiff, by permitting the sale to be made without objection, and by bidding on the property, may have estopped herself from setting up any interest in the land (beyond her third), yet she did not thereby estop herself from setting up her claim against the estate for the money.

The proceedings in the partition suit do not in any manner estop the plaintiff, on the ground of being a former adjudication of the same matter. Without stopping to enquire, especially, whether the same matter was adjudicated, it is sufficient to say that that suit was between different parties. Judgments bind only parties and privies, and the estoppel must be reciprocal. *Trevivan v. Lawrence*, 2 Smith Lead

The Connersville and New Castle Junction R. R. Company *v.* Calloway.

Cas. 654, and notes. As the administrator was not a party to that suit, and not estopped by the judgment therein, so neither can he use it against any one else as an estoppel.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to sustain the demurrer to the paragraph of the answer in question.

W. P. Edson, for appellant.

E. M. Spencer and *W. Loudon*, for appellee.



THE CONNERSVILLE AND NEW CASTLE JUNCTION RAILROAD
COMPANY *v.* CALLOWAY.

APPEAL from the Wayne Common Pleas.

PETTIT, C. J.—Appellee brought suit against the appellant to recover for killing stock by its train of locomotive and cars. Trial by the court, finding and judgment for the appellee, and appeal to this court.

The only question presented for our consideration is, the correctness of the finding and judgment of the court below, on the evidence, all of which is in the record. The evidence may be said to be conflicting, but it is nearly all in favor of the action of the court, and so far from the court's having committed an error, it clearly did right in its finding and judgment.

Judgment affirmed, with five per cent. damages and costs.

G. A. Johnson, *J. B. Julian*, and *J. F. Julian*, for appellant.

W. S. Ballenger, for appellee.

Whitman v. The State, *ex rel.* Hemminger.

WHITMAN v. THE STATE, on the Relation of HEMMINGER.

BASTARDY.—*Evidence.*—Where, in a prosecution for bastardy, the prosecuting witness testified that the child was begotten in a certain month or the next following month, and could not be any more definite as to the time, and it appeared in evidence that about the date at which the child was probably begotten, allowing the ordinary period of gestation, being about the first of the former month designated by her, she had sexual intercourse with several men, and it was not shown that there was anything peculiar in one of the connections or attending circumstances, which enabled her to determine that the child was begotten at that time;

Held, that the evidence was not sufficient to authorize a finding that the defendant was the father of the child.

APPEAL from the Harrison Circuit Court.

PER CURIAM.—This was a prosecution for bastardy. There was a trial by the court, a finding that the defendant was the father of the child, a motion for a new trial overruled, and judgment charging the defendant with the maintenance and education of the child.

The reason for the motion for a new trial was, that the finding of the court was contrary to law, and not sustained by the evidence. All the evidence is put in the record by a bill of exceptions.

The only error assigned is, that the court improperly refused to grant a new trial on the application of the defendant.

As we think the circuit court should have granted a new trial, we will set out the evidence in the case, that the ground of our opinion may appear.

Mary A. Hemminger, the prosecuting witness, swore, that she was nineteen years old, and unmarried, was delivered of a bastard child on the 3d day of June, 1869, which was then alive, and that the defendant was the father of the child; that it was begotten on the porch, at her father's house; that she had no connection with any body else either in September or October, 1868; that she was examined under oath as a witness in a bastardy suit commenced by her against this defendant about the 1st day of April, 1869, before Esq. Sipes.

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Remembered of having testified, at that time, that her child was begotten either in the month of September or October, 1868. She also testified then that some other men besides the defendant had sexual intercourse with her during those months, but at that time she did not know the meaning of sexual intercourse. She admitted that she was asked if these other men did not do the same thing to her that the defendant did when the baby was begotten; that she might have answered yes, for she was scared and did not know exactly what, or all that she said. She did say at that time that Paris Totten and Elijah Edwards had connection with her in September or October, 1868, but she thought connection meant to keep company with her. Now states that she did not know the meaning of the question asked her. Does not remember now that she admitted at Sipes' that Conrad Whitman, a brother of the defendant, had sexual intercourse with her twice during the last fall. Does not remember of meeting him in the woods, and did not say that he had connection with her at the school house; that defendant had been keeping company with her for two years. Here plaintiff rested.

Lawson H. Sipes, the justice of the peace before whom the other case was tried, on behalf of defendant, says: on that occasion the prosecuting witness testified that the defendant was the father of the child, or would be when it was born; that four or five other young men had sexual intercourse with her in September and October, 1868; and that her child was begotten in September or October, 1868. He then thought that she fully understood the question put to her, because her mother, who was present, told the defendant's attorney that she did not understand the meaning of the words he used in asking the questions, and the attorney then changed the language, and he thought anybody could understand him; she still answered the same way. He then found for the defendant. Although on the examination before him he thought she understood the questions, yet afterwards, on the examination before Esq. Utz, he had his doubts, and still has his doubts. Before him she admitted

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having had connection with Leander Adams and Whitman and Totten, but denied having had connection with Edwards.

Henry B. Utz. Was at the trial before Sipes; the prosecuting witness "sort of" admitted having had connection with other men, but somehow he thought she did not admit it. He thought she answered through fear. The questions, however, were plainly put, but he thought she would have answered yes to anything. He did not think she understood the questions.

Hamilton Seacat. Before Esq. Sipes, the prosecuting witness answered yes to some of the questions whether she had connection with other men, and as to some of them she denied it.

Elijah Edwards. About the 1st of September, 1868, he saw his brother, Reuben Edwards, have carnal connection with the prosecuting witness, at her father's house, on the porch, at night. She was lying on the porch floor. He also had carnal connection with her himself the next week after that, on the porch.

Paris Totten. Went to the house of the father of the prosecuting witness one night; had heard there was to be a peach cutting there; it was about the 1st of September, 1868; was there about two hours, and during that time he had carnal connection with the prosecuting witness, on one end of the porch, while his brother was sitting at the other end of the porch with her sister. Heard her admit at Esq. Sipes' that she had had carnal connection with Conrad Witman and Leander Adams. Here the defendant rested.

Catharine Hemminger. Is the mother of the plaintiff, recollects the time when Paris Totten and another young man came to their house. They were not on the porch more than fifteen minutes, and during that time the door was open, and a light standing on the bureau, which shone out on the porch all the time; they stood right in the door, and did not go away from it. He could not have had intercourse with her that night. At the trial at Esq. Sipes' her daughter did not

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understand the questions put to her about connection with other men.

This was all the evidence given in the cause.

There is one fact about which there seems to be no controversy ; and that is, that the child was born on the 3d day of June, 1869. Counting back from this time the ordinary period of gestation would fix the date at which the child was probably begotten at about the first of September, 1868. Conceding, as we think must be conceded, that she had sexual intercourse at that time with four or five different men, the question arises whether she could say which of them was the father of the child. If there was anything peculiar in one of the connections or attending circumstances, which enabled her to say that at that particular time the child was begotten, that peculiarity or those circumstances are not shown in the evidence. On the other hand, the testimony of the prosecuting witness herself excludes the idea of any such thing. She swore that the child was begotten in September or October, 1868, and could not be any more definite as to the time. It is quite evident that the testimony of the prosecuting witness, standing alone, must have been very unsatisfactory. She so fully admitted having had intercourse with four or five persons about the time when the child must have been begotten, that the justice of the peace who tried the first case concluded that she did not know who was the father of the child, and dismissed the case. The questions put to her on that occasion, not only before, but especially after, the suggestion by her mother that she did not understand them, were such as could hardly have been misunderstood by her.

Where the prosecuting witness has had sexual intercourse with so many men, near the time when the child was begotten, that she cannot know which of them is the father of the child, the defendant should be acquitted. This rule is recognized by several cases in this court, but has not been applied in any one. See *O'Brian v. The State, &c.*, 14 Ind. 469; *Townsend v. The State, &c.*, 13 Ind. 357. In Wharton and

Whitman v. The State, *ex rel.* Hemminger.

Stille's work on Medical Jurisprudence, § 305, it is said, "In an indictment for bastardy the mother will not be permitted to decide which of the connections about the same time was the operative cause of conception. The organs of conception, like those of digestion, perform their appropriate offices without the volition of the female. She is not conscious, at the moment of the occurrence, of what has taken place. It is only by *inference* that she can fix the paternity of her offspring. If her intercourse has been confined to one individual, there is no difficulty in drawing a correct conclusion from the premises. But if she has exposed herself to the embraces of several, at or about the time she became pregnant, she has placed it out of her power to draw any safe conclusions on the subject. Where causes are shown to exist, each of which is adequate to produce the effect, and there are no circumstances to determine the mind in favor of either, the true cause must necessarily remain uncertain." Reference is made to *Com. v. Fritz*, 8 P. L. J. 43, and *Com. v. M'Carthy*, 4 *Id.* 130 and 140.

When all the evidence in the case is considered, as we are in the habit of considering evidence in relation to other questions of fact, it seems to us to leave the paternity of the child in too much doubt to warrant the court in fixing it upon the defendant.

No doubt, circumstances might exist which would enable the female to determine which of two or more connections at about the time of conception was the one producing pregnancy. But, as we have already said, no such circumstance is shown in this case.

The judgment is reversed, with costs against the relator, and the cause remanded.

S. K. Wolfe and A. Stephens, for appellant.

Hardy v. Kirtland.

HARDY v. KIRTLAND.

JUDGMENT.—*Review of.—Evidence.—Divorce.*—In an action by a wife for a divorce, the plaintiff was granted a divorce, and it was also adjudged that she should pay to her husband a certain sum, and that he should at a certain date leave certain land owned by her on which he was residing. Afterwards, suit by her against him to review and correct said decree, so as to omit that portion thereof relating to the payment of money by her and to his leaving said land, as having been entered by the mistake of the clerk and without the order of the court. Upon the evidence, showing that the pleadings in said action for a divorce involved no issue except the question of the wife's right to a divorce, and showing that in the minutes of the judge on the court docket, which fully showed the various steps taken in the cause, the only minute of the decree was "divorce decreed" (though it appeared from the record in the suit for a divorce that the jury found, in answer to an interrogatory, that before the suit there was an agreement to a separation, that the wife agreed to pay the husband said sum, that the defendant was therefore entitled to said amount, and that he should leave said land at the date fixed by said decree), together with the fact that on general principles such an agreement could not be enforced, and such a decree could not be rendered in a suit for a divorce ;

Held, that it was proper to so correct the decree.

APPEAL from the Cass Common Pleas.

WORDEN, J.—At the December term of the Court of Common Pleas of Cass county, the appellee, then Frances Hardy, obtained a judgment of divorce against the appellant herein. It appeared at the trial of that cause that the said Frances owned some land on which the said Hugh was residing. It was adjudged, amongst other things, that said Frances pay to said Hugh the sum of two hundred and fifty dollars, and that said Hugh leave the place by the first day of February, 1869.

This suit was brought by said Frances against Hugh to review and correct the decree of divorce thus rendered, in reference to the two hundred and fifty dollars and the said Hugh leaving the place as above stated, alleging that those portions of the decree were entered on the order book by the clerk, through mistake, and without the order of the court, and that the court made no order requiring the said

Hardy v. Kirtland.

Frances to pay to said Hugh the money above mentioned, or directing said Hugh to leave the place as above stated, and praying that said entry may be corrected so as to conform to what was ordered by the court. Issue, trial by the court, finding and judgment for the plaintiff, a new trial being denied to the defendant, who excepted.

Three errors only are assigned, first, that the court found against the evidence; second, that the court decided against the law; third, that the court erred in refusing a new trial.

No question is raised by the first and second assignments except what is involved in the third; and under that, no question arises except as to the sufficiency of the evidence to sustain the finding.

We have examined the evidence, and think it fairly justifies the finding of the court. The plaintiff introduced the record of the divorce case in evidence. The ground of the divorce, as stated in the complaint, was cruelty on the part of the defendant, and incompatibility of temper. There were no children of the marriage, and the plaintiff sought no alimony. The only answer on which the cause was tried was the general denial. There was nothing in the issues tried that involved any question of liability of the plaintiff to the defendant in that suit, nor any question as to the occupancy of the plaintiff's land, even if such rights could be settled in a divorce suit. The jury who tried the cause, however, in answer to a question propounded to them, found that "there was an agreement, before this suit, to a separation, and we find that the plaintiff agreed to pay the defendant two hundred and fifty dollars, and we therefore find that the defendant is entitled to the above amount. * * * And the defendant is to leave the place by the first day of February, 1869."

The plaintiff also gave in evidence the minutes of the judge who tried the divorce case, entered upon the court docket. These minutes show quite fully the various steps taken in the cause from beginning to end, both before and

Hardy v. Kirtland.

after the decree. The minute of the decree is simply, "Divorce decreed."

These notes are so full generally, that we think, under the circumstances, if the judge had intended to grant any other judgment than that of divorce simply, there would have been some note of the further decree entered on his docket.

This view is greatly strengthened by the consideration that the court was not bound to enter the decree for the money, and in reference to the occupancy of the plaintiff's land, because of the finding of the jury above set out. We have seen that the pleading did not embrace any such question. Again, the agreement of the plaintiff therein to pay the money, being made while she was *covert*, was void and could not be rightfully enforced against her. And again, if not void on the ground of coverture, the agreement of a woman to pay her husband money to get rid of him, where she has to go into court for that purpose, and there succeeds, as in this case, in establishing her charge of cruelty, ought not, on general principles, to be enforced against her.

Indeed, we do not well see how the court could have made a decree that the plaintiff in that case should pay the defendant two hundred and fifty dollars, unless it was put upon the ground that she should pay him that sum as *alimony*. But we believe modern reformers have not yet gone so far in equalizing the sexes as to require the wife, on separation, to pay alimony to the husband.

On the theory that the court did not adjudge anything more than the divorce, we can well see how the clerk inadvertently fell into the error. He was simply following the verdict of the jury, instead of the minutes of the judge.

The judgment below is affirmed, with costs.

D. P. Jenkins, for appellant.

Sullivan v. Sullivan.

34	368
168	34

SULLIVAN v. SULLIVAN.

CHANGE OF VENUE.—Affidavit.—In an action for a divorce, an affidavit of the defendant, the husband, in support of a motion made by him for a change of venue, stated as the reason for the change, “that he believed he could not have a fair and impartial trial of said cause on account of an undue influence which the plaintiff had over the defendant in the cause.”

Held, that the application for a change of venue was properly refused, the affidavit showing no statutory reason.

DIVORCE.—Supreme Court.—The Supreme Court may, upon appeal, reverse a judgment granting a divorce.

SAME.—Condonation.—Doctrine of, Where Applicable.—In actions for divorce, the doctrine of condonation applies to cruel treatment as well as to adultery.

SAME.—Evidence.—Pleading.—Where in an action for a divorce on the ground of cruel treatment the complaint shows a condonation, and that the condition, which constitutes an element of condonation, that the offense shall not be repeated, and that the forgiven party shall treat the other with kindness, has been broken, as well as where in such an action the condonation is shown by answer, and the violation of such condition is shown by reply, the plaintiff is entitled to introduce evidence of acts of cruel treatment before the condonation as well as those after it; and it is not necessary, in order to entitle the plaintiff to a divorce, that the acts occurring after the condonation should of themselves, independent of those occurring before, constitute a cause for divorce.

APPEAL from the Madison Common Pleas.

DOWNEY, J.—This was a petition for a divorce on the grounds of cruel treatment and failure to provide, filed by the appellee against the appellant. It alleges, that after their marriage the parties lived together unpleasantly and disagreeably until May, 1867, when she left him and remained away for a period of six months, at the end of which time, in consequence of his solemn promises to treat her well and kindly, she returned; that he kept his pledge, “by the greatest effort,” for about one month. The acts of cruel treatment are alleged to have taken place after this time, as also the failure to provide.

After several steps in the case, concerning which there is no complaint, the defendant moved the court for a change of venue, upon an affidavit stating that he believed that he could not have a fair and impartial trial of said cause on account

of an undue influence which the plaintiff had *over the defendant* in the cause, and he asks, &c.

The court refused to grant a change of the venue. This was right. The affidavit showed no reason known to the statute for a change of venue.

There was a trial by the court, and finding and judgment for the plaintiff, for a divorce, three hundred dollars of alimony, and the custody of one of the children, the custody of the other one being given to him. Motion for a new trial overruled, and the evidence put in the record by a bill of exceptions.

The appellee contends that this court will not, in any case, reverse a judgment granting a divorce, and refers to 2 G. & H. 349, sec. 7; *McFunkin v. McFunkin*, 3 Ind. 30; *Ewing v. Ewing*, 24 Ind. 468. But counsel are mistaken in supposing that the authorities referred to have any application to cases on appeal to this court from a judgment granting a divorce. This court has repeatedly reversed cases on appeal where a divorce had been granted.

The defendant contends that the court committed an error in admitting evidence, over his objection, of acts of cruel treatment which took place prior to the reconciliation mentioned in the petition. He contends that there was a condonation as to all of such acts, and that the court should not have received evidence of them.

The petitioner, thereupon, insists that the doctrine of condonation applies exclusively to the offense of adultery, and does not apply to cruel treatment.

We have examined some of the authorities on the question, and are satisfied that the doctrine applies to cruel treatment as well as to adultery. 2 Bishop Marriage and Divorce, § 50.

Condonation is defined to be the forgiveness, either express or implied, by a husband of his wife, or by a wife of her husband, for a breach of marital duty, as adultery, with an implied condition that the offense shall not be repeated.

Webster's Dictionary. With reference to the condition, Bouvier, in his Law Dictionary, says, "Every implied condonation is upon the implied condition that the party forgiven will abstain from the commission of the like offense thereafter, and also treat the forgiving party, in all respects, with conjugal kindness. Such, at least, is the better opinion; though the latter branch of the proposition has given rise to much discussion. It is not necessary, therefore, that the subsequent injury be of the same kind, or proved with the same clearness, or sufficient of itself, when proved, to warrant a divorce or separation."

While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned. 2 Bishop on Marriage and Divorce, § 33.

It will be seen that an important element in the definition is the condition on which the remission or forgiveness is granted. It is upon the condition subsequent that the offense shall not be repeated, and that the forgiven party will treat the other with kindness. If the condition had been violated in this case, as alleged in the petition, then, it seems to us, that it was proper to allow the wife to give evidence of the acts of cruel treatment before as well as after the condonation, for, as we have seen, it was not necessary that the acts occurring afterwards should, of themselves, independent of those occurring before, constitute a cause for a divorce.

Had the case proceeded in a different, and perhaps a more usual and natural way, the petition would have alleged the cruel treatment, &c., the defendant would have pleaded the condonation in defense, and the petitioner would have replied the subsequent acts as a violation of the implied condition on which the condonation took place. It is decided by this court, in *Lewis v. Lewis*, 9 Ind. 105, that condonation must be specially pleaded. But that rule cannot apply to a case like this where the petitioner sets up the condonation, and then also alleges the violation of its condition. As will be seen by referring to the petition, she alleges the living to-

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gether after their marriage, their separation, their reconciliation and living together again, and then the subsequent acts of misconduct on his part. In such a case, it is not necessary for the defendant to plead the condonation in order to have the benefit of it. As the pleadings stood, the court committed no error in hearing the evidence to which objection was made.

Again, the defendant complains of the admission of certain evidence of statements made by his wife, in his absence, tending to show a failure on his part to provide for his family. But we need not decide this point, for the reason that all the evidence fails to show that the defendant did fail to provide for his family. If there were no other cause alleged for a divorce than his failure to provide, the case, on the evidence, would be clearly with the defendant.

Upon the question of cruel treatment, we think the evidence was sufficient to justify the finding of the court. It is true that most of the acts of cruel treatment took place prior to the condonation, but there were acts occurring afterwards, sufficient to revive the right to sue for those which occurred before. Among other facts, one witness swore that he "saw her come out of the back door of his house, and his foot was after her." The court may have inferred from this that she was forcibly expelled from the house.

The judgment is affirmed, with costs.

W. R. Pierse and H. D. Thompson, for appellant.

R. Lake and J. A. Harrison, for appellee.

JULIAN v. BEAL.

SUPREME COURT.—Rulings of.—The inferior courts of this State are bound by the rulings of the Supreme Court until they are overruled by it.

Julian v. Beal.

APPEAL from the Madison Circuit Court.

BUSKIRK, J.—This is the second time that this cause has been in this court. It will be found reported in 26 Ind. 220. The question involved when the case was here before was as to the correctness of the ruling of the court below in sustaining a demurrer to the second paragraph of the reply. This court held that the court erred in sustaining the demurrer, and for that cause reversed the case and remanded the cause, “with directions to overrule the demurrer to the reply, and for further proceedings.” The decision was rendered at the May term, 1866.

We are informed by the record, that at the August term, 1868, of the Madison Circuit Court, the appellee again demurred to the second paragraph of the reply, and that the court below, in plain violation of the decision and orders of this court, sustained the demurrer to the reply. Whereupon, the appellant withdrew his denial, and refused to plead further, and judgment was rendered for the appellee; and the appellant has again been compelled to bring his case to this court to obtain a reversal of the erroneous and improper ruling of the court below.

There was no amendment to the reply after the case was decided in this court. The reply stood just as it did when this court reversed the ruling of the court below and directed that court to overrule the demurrer to the reply. The court below disregarded the decision and orders of this court, and again sustained a demurrer to the reply. The inferior courts of this State are bound by the rulings of this court until they are overruled by it. *Leard v. Leard*, 30 Ind. 171.

It is the duty of the inferior courts of this State to implicitly obey and execute in good faith the decisions and orders of this court, and if this be not done the administration of justice would become a farce and a reproach. “The reversal by this court, *ex vi termini*, vacates the judgment of the court below, without any action of that court. On the filing of the certified opinion of this court in the clerk’s office of the circuit court, it was the duty of that court to proceed

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with the cause from the point reached by the judgment of reversal." *Cox v. Pruitt*, 25 Ind. 90. We have examined the question presented by the ruling of the court upon the demurrer to the reply, and we are entirely satisfied with the former decision of this court.

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to overrule the demurrer to the reply, and for further proceedings in accordance with this opinion and judgment.

J. Davis, J. B. Julian, and J. F. Julian, for appellants.

J. W. Sansberry, for appellee.

MOONEY and Another *v.* MUSSER and Others.

84 373
157 533

PLEADING.—*Counter Claim.*—Suit on an account for advancements made by the plaintiff as factor of the defendant, upon a quantity of leather consigned by the plaintiff to the defendant for sale. Answer, that the plaintiff was acting as factor of the defendant, and as such had in his possession a certain large quantity of the defendant's leather of a certain value; that before that time the plaintiff had been instructed by the defendant not to sell said leather for less than thirty cents per pound over and above all costs and charges; but that in violation of such instruction, the plaintiff sold said leather for thirty cents per pound, subject to all costs and charges, wherefore the price of the leather was reduced to twenty cents per pound, above costs and charges; and the answer claimed damages in a certain sum as a counter claim, asking judgment, &c.

Held, that the answer set up a good counter claim.

INTERROGATORIES.—*How Used.*—The answers of a defendant under oath to interrogatories propounded to him by the plaintiff, under section 303 of the code, cannot be used in support of a motion to strike out an answer of general denial.

APPEAL from the Marion Civil Circuit Court.

PETTIT, C. J.—This suit was brought by the appellees to recover a balance upon an account stated, which it was alleged had accrued to them as factors of the appellants, for

advancements made upon certain large quantities of leather consigned to them by the appellants for sale.

The appellants answered in three paragraphs, first, by general denial; second, by counter claim; third, by set-off. The second paragraph is, in substance, that the plaintiffs were acting as factors of the defendants and as such had in their possession a large quantity of the defendants' leather, to wit, twelve thousand pounds, and of the value of four thousand dollars; and that before that time the plaintiffs had been instructed by the defendants not to sell said leather for less than thirty cents per pound over and above all costs and charges, but that in violation of such instructions, they sold the same for thirty cents per pound, subject to all costs and charges, wherefore the price of the leather was reduced to twenty cents per pound above costs and charges; and they claimed damages of twelve hundred dollars, which they set up as a counter claim, asking judgment, &c.

The third paragraph is the same in substance as the second, setting up the same subject-matter as in the former, and by way of set-off. Separate demurrers, for want of sufficient facts, were sustained to these paragraphs.

We cannot conceive of a better counter claim, nor one better pleaded, than the second paragraph sets up; and the court erred in sustaining a demurrer to it. How it might be avoided by a proper reply is not for us to say, but the answer upon its face is clearly good. If it had not been thus set up, the defendants could never have maintained suit upon it except at their own costs. 2 G. & H. 91, sec. 59; *Id.* 92, sec. 60; *Woodruff v. Garner*, 27 Ind. 4. The third paragraph we hold to be a duplicate, in substance, of the second, and it might, for that reason, have been stricken out on motion, and as the same result was reached by sustaining the demurrer to it, we cannot say that the action of the court in this respect was such an error as the appellants have a right to complain of.

There were interrogatories filed by the appellees and answered by the appellants, and on the filing of the answers,

the court, on the motion of the appellees, struck out and set aside the general denial. This was error. The general denial is not sham pleading on its face, and the court cannot use answers to interrogatories to show it to be such. They can only "be used, or not, on the *trial*, at the option of the party requiring them." 2 G. & H. 189, sec. 303. See *Bog-gess v. Davis*, decided at this term, *ante*, p. 82.

The judgment is reversed, at the costs of the appellees, with instructions to the court below to overrule the demurrer to the second paragraph of the answer, and the motion to strike out the first paragraph of the answer, and for further proceedings.

BUSKIRK, J.—I disagree with this opinion so far as it relates to striking out the first paragraph of the answer for the reason stated.

J. E. McDonald and *E. M. McDonald*, for appellants.

U. J. Hammond and *L. Howland*, for appellees.

BROWN and Others v. McALISTER and Others.

84	875
154	84
154	85

WILL.—Attestation.—It is not necessary to the due execution of a will that the testator should in any manner indicate to the witnesses who attest it that the instrument is the will of the person executing it.

APPEAL from the Vanderburg Common Pleas.

WORDEN, J.—This was a proceeding under the statue, by the appellants against the appellees, to set aside the probate of the will of Octavia E. Lewis, and have the same declared void. Demurrer to the complaint sustained, and exception. Final judgment for defendants.

It was alleged that the will was not duly executed, because of the facts stated as follows, viz.:

"That on the day of the date of the instrument, said Oc-

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tavia E. brought the same to the office of Brown, Dunkerson & Co., Evansville, and folding the paper on which said instrument was written, so as to conceal the whole of the writing thereon, said to William Brown and Robert K. Dunkerson, who were present, 'Gentlemen, I want you to witness my signature.' Whereupon she wrote her name upon said paper (the writing thereon being all the time concealed from them by the manner in which the paper had been folded), in the presence of said Brown and Dunkerson, who then and there wrote their names upon said paper as witnesses to said signature, the writing upon said paper being all the time concealed from said Brown and Dunkerson; that said Octavia E. did not, during said interview, nor at any other time, communicate to said Brown and Dunkerson, or either of them, that the writing upon the paper to which they had signed their names was a will, nor were they ever so informed; nor did said deceased ever speak any word indicating to said Brown and Dunkerson, or either of them, that said instrument was a will; nor did they ever know the fact in the lifetime of said Octavia E.; that she did nothing, at the time of signing the paper, indicating an intention to publish, declare, or deliver said instrument as a deed, a will, or any other instrument. The folding of the paper, the silently writing her name, by deceased, the request above mentioned, the silently writing of their names by Brown and Dunkerson, being all that was said or done on the occasion; that the instrument is in the handwriting of one Horatio Q. Wheeler, and not in handwriting of the deceased; that said Brown and Dunkerson, nor either of them, ever saw or heard of said instrument except as above stated; nor did either of them know that said signing was the signing of any instrument till since the death of the said Octavia E.; that the writing of the name by said deceased, in the manner above stated, and the writing of their names by said Brown and Dunkerson, in the manner aforesaid, is all the signing, attestation, or subscription ever done to said instrument; and therefore said will was never duly attested," etc.

The statute provides, that "no will except a noncupative will shall affect any estate, unless it be in writing, signed by the testator, or by some one in his presence, with his consent, and attested and subscribed in his presence by two or more competent witnesses." 2 G. & H. 555, sec. 18.

The question raised by the pleading is, whether, in order to a due execution of a will, it is necessary that the testator should in any manner indicate to the witnesses who are called upon to attest the same, that the instrument or document thus to be executed and attested is the will of the party executing the same.

We have been favored with able and exhaustive briefs on this question, by the counsel on each side of the cause, who have, respectively, cited a large number of cases and text books bearing upon the question. We shall not go into a discussion of the authorities upon this question; they are in some degree conflicting. We may quote the following passage from an elementary writer: "The mere fact that one calls upon witnesses to subscribe a paper, as witnesses of its execution, is, no doubt, abundant evidence of his acknowledgment that he executed it. And the distinction may be rather nice, when it is admitted the witness need not know the contents of a will, to argue that they should be made aware, either by word or act, that the testator declared or recognized, in some way, the paper to be his will. But such would seem to be the fair implication of the word attested, in the statute in regard to the execution of wills. *But the weight of authority seems to be in the opposite direction.*" 1 Redfield on Wills, 223.

We are satisfied that the weight of authority is as stated in the above quotation, and, therefore, that the will in question was duly executed.

The judgment below is affirmed, with costs.

DOWNEY, J.—I fully concur in the result announced in the foregoing opinion, but I do not agree that the question raised for our decision is that stated in the opinion. The question

Brown and Others v. McAlister and Others.

is not, in my judgment, whether, in order to a due execution of a will, it is necessary that the testator should in any manner *indicate* to the witnesses who are called upon to attest the same, that the instrument or document thus to be executed and attested is the will of the party executing the same. The opinion, by answering this question in the negative, does, in my judgment, decide more than is involved in the case. There were indications, and very strong ones too, that the paper was a will. The very fact that it was to be signed in the presence of two witnesses and attested and subscribed by them, which ceremony does not, by our law, attend the execution of any other instrument, and that it was so executed, indicated that it was a will. Hence I think that the court need not, and should not, in this case, decide that no "indication" of its being a will is necessary to its validity. But as it is shown by the facts that the testatrix went to the persons who were chosen by her to be the witnesses, produced the paper already written, told them that she desired them to witness her signature, and thereupon signed the paper in the presence of the witnesses, who then and there wrote their names to it as witnesses, the question in the case is, whether or not it was necessary that she should, in addition, have *stated* to the witnesses that it was her will. I decide that it was not necessary that she should have made such *statement*, and that the will was properly signed by the testatrix and attested and subscribed by the witnesses without such statement.

A. Iglehart and F. F. Chandler, for appellants.

F. M. Shackelford, L. Q. DeBruler, and C. A. DeBruler, for appellees.

Biddle v. Reed.

THE BOARD OF COMMISSIONERS OF MORGAN COUNTY v. TARLETON and Another.

APPEAL from the Morgan Common Pleas.

WORDEN, J.—We affirm the judgment in this case upon the authority of the case of the same appellant against Holman and another, decided at the present term of this court, *ante*, p. 256, as that case decides all the questions involved in this.

The judgment below is affirmed, with costs.

W. R. Harrison and *W. S. Shirley*, for appellant.

C. F. McNutt, *W. A. Montgomery*, and *G. W. Grubbs*, for appellees.

BIDDLE v. REED.

APPEAL from the Allen Circuit Court.

DOWNEY, J.—This was an action by the appellee against the appellant for the recovery of other instalments of rent on the same lease that was the foundation of the action in the case between the same parties, decided by this court at the present term, 33 Ind. 529. The defenses were the same, and the questions presented here are the same, as in that case.

For the reasons there given, the judgment is affirmed, with five per cent. damages and costs.

L. M. Ninde, for appellant.

J. A. Fay, for appellee.

Hereth and Another *v.* The Merchants' National Bank of Indianapolis.

HERETH and Another *v.* DAVIS and Others.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—This action was upon two promissory notes similiar to the note in the case at this term by the same appellants against Meyer (33 Ind. 511), executed at the same time and for the same consideration as the note in that case.

There was a trial by jury, verdict and judgment for the appellees. Motion for a new trial overruled, bill of exceptions copied into the record, but not signed by the judge.

There is no question in the case not already decided by this court in the case to which we have referred.

The judgment is affirmed, with two per cent. damages and costs.

J. E. McDonald, A. L. Roache, E. M. McDonald, J. M. Butler, P. W. Bartholomew, A. G. Porter, B. Harrison, and W. P. Fishback, for appellants.

F. Rand and R. H. Hall, for appellees.

HERETH and Another *v.* THE MERCHANTS' NATIONAL BANK
OF INDIANAPOLIS.

PROMISSORY NOTE.—*Payable in Bank.*—*Indorsee.*—In a suit on a promissory note made payable to order or bearer in a bank in this State, brought by an indorsee against the maker, the fact that the note was procured by fraud does not constitute a good defense, if the plaintiff purchased the note for a valuable consideration, in the usual course of business, before it was due, and without notice of the fraud.

SAME.—*Patent Right.*—The words, "this note is given for patent right," written on the margin of such a note will not authorize the jury in such action on said note to infer that any indorsee thereof had knowledge or notice that the patent for which the note was given was of no value, or that the note was procured by fraud.

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SAME.—*Purchaser with Notice.*—Where such a note has been procured of the maker by the fraud of the payee, by whom it has been indorsed to a third person, another person who has purchased the note of such indorsee with actual knowledge that it was so procured, or with notice of any facts indicating to a reasonably prudent man that it was so procured, cannot recover in a suit on the note against the maker, unless said third person of whom he purchased it was an innocent holder for value.

SAME.—*Purchaser from Innocent Holder.*—A person to whom a promissory note governed by the law merchant has been transferred or indorsed, for a valuable consideration, before it was due, by an innocent holder thereof for value, may recover on it against the maker, though he knew at the time he purchased it that it had been procured of the maker by the fraud of the payee.

SAME.—*Holder in Good Faith.*—One who purchases a promissory note negotiable by the law merchant, for a valuable consideration, before maturity, without notice of any equities existing between the original parties to the note, or of any fraud having been used to procure the execution of the note, is to be deemed a holder in good faith.

SAME.—*Notice.—Inadequacy of Price.*—Whether inadequacy of the price asked for a note offered for sale is a circumstance indicating to the purchaser that it was procured by fraud, is a question for the jury.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—This was an action predicated upon a promissory note, payable at a bank in this State, and having in the margin thereof the words, "This given for patent right." It was payable to one Hartwell, by him indorsed to Noble, and by him to the appellee. It was executed at the same time, and for the same consideration, as the note in the case decided at this term in which Hereth and another were appellants and Meyer was appellee, 33 Ind. 511. The defense set up was the same as the defense in that case. The jury found for the plaintiff, and in answer to interrogatories, found that neither Noble nor the appellee had any notice of any defense to the note, at or before the time when they purchased the note.

The case is before us on the alleged error of the common pleas in refusing a new trial. The evidence is set out in the bill of exceptions, and also certain charges which the court refused to give, and others which were given, to which the appellants excepted.

There is a preliminary question. In the record there are

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copied the interrogatories and answers of the defendants thereto, and two affidavits for continuance, which are not made part of the record in any proper way; also the first and fourth paragraphs of the defendant's answer, which the record shows were withdrawn. A motion is made to strike out these parts of the record.

We think the motion ought to be sustained. An intelligent clerk can have no reasonable excuse for thus encumbering and swelling the record.

The first assigned error, arising out of the overruling of the motion for a new trial, is the giving of instructions 10, 11, 12, 13, and 15, by the court to the jury. They are as follows:

"10th. The note, being made payable in a bank, in this State, is by our laws commercial or negotiable paper, and the defendants who put such paper in circulation cannot set up as a defense against the plaintiff that the note was procured by fraud, if the plaintiff purchased the note for a valuable consideration, in the usual course of business before it was due, and without notice of the fraud."

"11th. On the margin of the note in suit are written the words, 'This note is given for patent right.' These words alone will not authorize you to infer that the plaintiff or her agents, or the defendant Noble, had knowledge or notice that the patent for which the note was given was of no value, or that the note was procured by fraud."

"12th. When the note was offered for sale to the plaintiff, she or her agents were not bound, from seeing the words 'This is given for patent right' written on the margin of the note, to make any inquiry of the makers or others as to the patent right, to ascertain its value or whether any fraud had been used in procuring its sale; for patent rights are legitimate subjects of sale; but if the plaintiff or her agents had actual knowledge, or notice of facts or circumstances from any source, indicating that the note was procured by fraudulent means, then the plaintiff would not be an innocent purchaser; and if there was fraud practiced by the payee of

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the note, by means of which it was procured to be made, the plaintiff cannot recover against the makers of the note, unless you find that the defendant Noble, of whom the plaintiff purchased the note, had no knowledge or notice of fraud; the rule of law being that an innocent purchaser, one who acquired the paper in good faith, may transfer it before it is due for a valuable consideration, even to one who has notice of the note having been procured by fraud, and the person to whom it is so transferred or endorsed will be entitled to recover against the makers."

"13th. The purchasers of negotiable paper, for a valuable consideration, before maturity, without notice of any equities existing between the original parties, or of any fraud having been used to procure the execution of the note, or which is the same thing, actual knowledge or notice of facts and circumstances indicating to the mind of a reasonably prudent man that the note was procured by fraudulent means, are to be deemed as holders in good faith."

"15th. If either Noble or the plaintiff or both of them received the note in question by endorsement, in the usual course of business, before it was due, for a valuable consideration, without any knowledge that it was subject to any defense, the jury must find for the plaintiff against the defendants Langsdale and Hereth, the makers of the note."

The tenth instruction seems to us to contain a correct statement of the law. It is expressly provided by statute, that promissory notes made payable to order or bearer, in a bank, in this State, shall be negotiable as inland bills of exchange. 1 G. & H. 450, sec. 6. The law with reference to such paper is certainly as laid down by the court in this charge.

With reference to the eleventh charge, and that part of the twelfth which speaks of the effect of the words of the memorandum on the margin of the note, as evidence, we think the charges were correct. We have already so decided in the case to which we have already referred, between these same appellants and another party. As to the other branch of

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the twelfth charge, it is well settled that if the plaintiffs were purchasers of the note for value, before its maturity, and without notice of any infirmity in the paper, it could make no difference whether Noble was or was not an innocent holder. In Chitty on Bills, 79, it is said, "In general, the circumstance of a bill or note having been obtained without adequate consideration, or even by duress or fraud, or misapplied by an agent to his own use, affords no defense where the instrument comes into the possession of a *bona fide* holder for value, without notice, and before it is due. It is but just, that if one of two innocent persons must sustain a loss, he who has suffered a negotiable security with his name attached to it to get into circulation ought to bear the loss, and seek his remedy against the person who improperly passed the instrument."

Again, it is well settled, that the purchaser of commercial paper from one who is an innocent holder for value, may recover on it, notwithstanding he knew that there were defenses against the note, at the time he took it. *Hascall v. Whitmore*, 19 Me. 102; *Smith v. Hiscock*, 14 Me. 449.

The thirteenth charge was in accordance with the well established rule of law, and gave the jury a correct statement as to the persons who are to be regarded as holders of paper in good faith.

The next point made is that the court erred in refusing to instruct the jury as asked by the appellants.

The bill of exceptions contains this statement on this subject: "And be it further remembered that after the evidence had been concluded and before the argument of the cause had commenced, the defendants Langsdale and Hereth, by their counsel, requested the court to give the following instructions to the jury, to wit." Then follow the instructions which were asked.

If it was asked that these charges should be given before the argument of the cause, as would seem to be inferable from the words, then they were correctly refused by the court for that reason. But as this point is not made by the

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appellee we will examine the charges which were asked and refused. They are as follows:

"1. If the jury find from the evidence that the note sued upon was obtained by fraud, and that the same was assigned to the plaintiff with a knowledge of the fraud, or of such facts as would put a prudent man upon inquiry, they must find for the defendant."

"2. Where there are marks of an unusual character upon a negotiable note, a party who proposes to become the purchaser of such a note must, at his peril, make himself acquainted with their full meaning, and if by inquiry it would lead to the discovery of the fact that the instrument was void on account of fraud or otherwise, then the purchaser will be held not to be a *bona fide* holder of such note."

"3. If the note in question was purchased by the plaintiff at a higher rate of discount than was customary with the plaintiff in discounting commercial paper, and the makers of the note were believed by the plaintiff, when she purchased the note, to be responsible and prompt, the jury are entitled to consider this a circumstance tending to show that the plaintiff when she purchased the note was put upon inquiry and believed that the note was affected with some infirmity."

"4. Where a note has been procured by the payee by fraud, if the purchaser of it buys it under such circumstances as would put a prudent person upon inquiry, then he has no better right to recover upon the note than the payee would have had."

"5. If the jury believe from the evidence that the plaintiff's agents Malott and Noble bought the note under such circumstances as to put them upon inquiry and charge them with notice of the infirmity of the note, and if they believe that the note was procured from Langsdale and Hereth by fraud, it is competent for the jury to find in favor of defendants Langsdale and Hereth, and against the defendant Noble."

The first of these charges was too indefinite to go to the

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jury, and is liable to the objection that it ignores the legal proposition which we have already laid down, that, though the plaintiff knew of the fraud, yet if the plaintiff's indorser did not, and was an innocent holder, &c., the right of the plaintiff to recover would not be affected.

The "marks of an unusual character," alluded to in the second charge, are no other, we presume, than the words written on the margin of the note, expressing what was the consideration of it. We have already said that these of themselves were not sufficient to put a party on inquiry.

The circumstance referred to in the third charge, and its force and effect were left to the jury by the court for whatever they were worth, if there was evidence from which the jury could find or infer their existence. The court told the jury, in the twelfth charge, that "if the plaintiff or her agents had actual knowledge or notice of facts or circumstances from any source, indicating that the note was procured by fraudulent means, then the plaintiff would not be an innocent purchaser," &c. Inadequacy of price, if there was any, could be no more than a circumstance, which the jury might consider, and under the part of the charges just quoted, they were at liberty to give it what weight they thought it deserved. The court was not bound to repeat the same instruction in substance.

The fourth charge overlooks the rule before referred to, that a purchaser may know of faults in the note, and still be protected by the innocence of the party from whom he obtained it, and should not, for that reason, have been given. If Noble was a *bona fide* holder, the plaintiff might have been aware of all the facts concerning the fraud and still be entitled to recover.

There is no pretense of any evidence in the case tending to show that Malott and Noble were the agents of the plaintiff, as assumed in the fifth charge. But if there was such evidence, then charge number seventeen, as given by the court, covered the ground fully which was taken in the rejected fifth charge. The court said to the jury in that charge,

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"If you believe from the evidence that the plaintiff's agent Malott and Noble bought the note with a knowledge of such circumstances and facts as to charge them with knowledge or notice of any infirmity in the note; and if you believe that the note was procured from Langsdale and Hereth by fraud, it is competent for you to find in favor of the defendants Langsdale and Hereth, and against the defendant Noble."

It is proper to say that among the charges given by the court to the jury, not excepted to, is the following:

"14. Where there are marks of an unusual character upon a note which might not, of themselves, be sufficient to affect the purchaser with notice of any infirmity in the instrument, yet slighter circumstances in such cases will be regarded as having put the purchaser upon inquiry, or as having affected him with notice of such infirmity, than where no such marks were upon the instrument."

We are satisfied that no error was committed by the court with reference to the charges given, or those refused.

The third position assumed is, that the court erred in admitting improper evidence; and the fourth ground relates to the exclusion of competent, material, and relevant testimony offered by the defendants.

We find nothing in the record to sustain these assignments, and nothing is said on the subject in the appellants' brief. Neither the motion for a new trial, nor the assignment of errors, nor yet the brief of the appellants, in any way points out or specifies any such irregularity.

The last assignment of error is that the court should have granted a new trial, on the application of the defendants, on the ground that the verdict of the jury is not sustained by sufficient evidence.

We do not see how the jury could have found otherwise than as they did upon the question whether the plaintiff was or was not a *bona fide* holder of the note. The note was sold and indorsed by Hartwell, the payee, to Noble, and by him to the plaintiff, almost immediately after it was executed,

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and at a time when the defendants themselves had not yet discovered the fraud and the worthlessness of the patented article of which they now complain.

The judgment is affirmed, with two per cent. damages and costs.

A. G. Porter, B. Harrison, W. P. Fishback, P. W. Bartholomew, J. E. McDonald, A. L. Roache, E. M. McDonald, and J. M. Butler, for appellants.

L. Barbour, C. P. Jacobs, and T. H. Bowles, for appellee.

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MORTGAGE.—Foreclosure.—Priority of Lien.—A. sold certain real estate to B. to whom he gave a title bond therefor, and B. assigned and delivered said title bond to a certain firm to secure an indebtedness of B. to said firm. Afterwards B. executed a mortgage on said real estate to C., who assigned it to D. Subsequently, A., having been paid for the land, conveyed it in fee simple to the wife of C., said firm surrendering to A. the title bond and accepting from C. and wife, for the debt due said firm less a part thereof thrown of, a note and mortgage on said land, which note and mortgage was, for convenience, taken in the name of one of the partners, this arrangement being made by the consent of B., C. and wife, and said firm; D. having no knowledge of the transaction, and said firm having no actual knowledge of said mortgage held by D., which had been recorded.

Held, that the lien of said mortgage to said partner was prior to that made to C. and assigned to D.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—This was a suit to foreclose a mortgage, commenced by the appellant, against Bertha Landgraf, Jacob Landgraf, and Joseph B. Dessar. Dessar sets up a mortgage on the same real estate, and the question, and only question, is as to the priority of lien.

The facts necessary to an understanding of the case are as follows: One Stevens was the owner of the lot. He sold it to Landgraf and wife, and gave them a title bond. They

assigned and delivered the title bond to Dessar, Bro. & Co. as security for the payment of a debt, on the 7th day of March, 1867. On the 13th of December, 1867, Landgraf and wife executed the mortgage on the lot which the plaintiff sought to foreclose, to one Slatter, who afterwards assigned it to the plaintiff.

On the 18th of March, 1868, Stevens, having been paid for the lot, conveyed it in fee simple to Eliza Slatter, Dessar, Bro. & Co. surrendering up to Stevens the title bond and accepting from Slatter and wife notes and a mortgage on the lot for the debt due them, less a part thereof which they threw off. This arrangement was made by the consent of Dessar, Bro. & Co., Landgraf and wife, and Slatter and wife. The notes and mortgage from Slatter and wife for the debt due to Dessar, Bro. & Co., were executed to Dessar, a member of the firm of Dessar, Bro. & Co., for convenience. Dessar, Bro. & Co. had no actual notice of the mortgage of plaintiff, and he had no knowledge of the transaction of March 18th, 1868.

Dessar, Bro. & Co. had the first lien, by virtue of the assignment to them of the title bond. But Calvert insists that on account of their giving up the title bond that the fee might be vested in Mrs. Slatter by the deed from Stevens, and taking the notes and a mortgage on the same premises to secure them, in some way had the effect to postpone their claim and give him priority. We cannot see how this can be so, and we are not referred to any authority in support of the position. The arrangement was no injury to Calvert, but rather a benefit, inasmuch as Dessar, Bro. & Co. threw off a part of their claim, and thereby made it easier, instead of more difficult for Calvert to make his money.

The yielding up of the title bond by Dessar, Bro. & Co. and at the same time taking in lieu thereof the mortgage cannot, we think, be construed into a waiver of their lien, or a postponement thereof. It is true that the form of the security was changed. After the arrangement of March 18th, 1868, Dessar held the evidences of debt instead of the firm of which

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he was a member, and he held the notes of Slatter and wife and a mortgage on the lot, instead of the note of Landgraf and the title bond. But the debt was the same, and they had never for a moment given up, or thought of giving up their lien on the property. We do not regard the fact that the mortgage of Calvert was of record as material in the case. His mortgage was always a slender security. It was taken from mortgagors who had no legal title to the property, and had already assigned away all the evidence they had of any equitable claim to the lot. At most, he had only the right to a lien on the equitable interest of Landgraf and wife in the title bond, which had been previously assigned away, and that only entitled him to redeem by paying off the debt to Dessar, Bro. & Co. or to claim subject to it.

Judgment affirmed, with costs.

J. S. Harvey and N. Van Horn, for appellant.

J. T. Dye and A. C. Harris, for appellees.

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EXCEPTIONS.—Form of.—Written and Oral Instructions.—On the trial of a cause, the court was requested, at the proper time, by the defendant, to charge the jury in writing, but disregarding the request, gave, with certain written instructions, certain verbal explanations thereof and verbal instructions. No objection was made at the time the instructions and explanations were being given, but after they had been given, and the bailiff had been sworn to take charge of the jury, and before the jury retired, the defendant's attorney stated that he excepted to the instructions; and when asked to specify which instructions he excepted to, he said that he excepted to all, and that all included each. *Held*, that this exception was sufficiently specific to raise the question of the giving of the verbal instructions and explanations in disregard of the defendant's request.

Held, also, that such disregard of the defendant's request constituted a good ground for a motion by him for a new trial.

APPEAL from the Pulaski Circuit Court.

DOWNEY, J.—The appellees sued the appellants, alleging in their complaint that they owned a mill, on Mill creek; and that the defendants had erected a dam a little below their mill, by which the back-water was caused to accumulate so that it had interrupted them in the use of their mill.

Answer, first, a general denial; second, license. Reply in denial of the second paragraph of the answer. Trial by jury, and verdict for the plaintiffs. Motion for a new trial overruled, and judgment on the verdict.

There is only one question in the case, and that arises on the refusal of the court to grant a new trial. The specific ground on which it is insisted that the new trial should have been granted is that the court gave oral instructions and explanations of instructions after having been requested to charge in writing. There is no dispute that the court was requested in time so to charge the jury; nor is it denied that the court disregarded the request, and gave the oral instructions, &c. But objection is made to the form of the exception.

The bill of exceptions says, after setting out the request, and copying certain written instructions, that the court accompanied the written instructions with certain verbal explanations and other verbal instructions not appearing in the bill of exceptions, which at the time they were being given were not objected to; that after his instructions had been so given, and the bailiff sworn to take charge of the jury, but before the jury retired, the defendants by counsel stated that they excepted to the instructions of the court; and when asked to specify which instruction they excepted to, stated that they excepted to all, and that all included each.

The reason generally assigned for requiring the exception to instructions to be specific is that the court may have an opportunity to re-examine the charge and make any corrections of mistakes which may be brought to its attention by the exception.

Here the court had been required to give all instructions in writing, and in disregard of this request, and in violation

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of duty, gave oral instructions and explanations. It is true that it is not stated in the bill of exceptions specifically that an exception was taken to the giving of the instructions and explanations orally. But the exception was to all, and the court was informed that that was intended to include each. We think that this related not only to the written, but also to the oral instructions, and that it was sufficiently specific. The defendant could not note on the charge the exception to the oral charges.

We think the counsel for the defendants was not bound to interrupt the court in the midst of its charges in order to except to the manner of giving the charges.

The right to have the instructions in writing is an important and valuable one, and we are not required to analyze the exception and examine it with the utmost particularity, in order to support the action of the court below in violating and depriving the party of that right.

The next thing to having justice administered in an inferior court, is to have the right of appeal fully and fairly accorded.

We think it proper to say that the regular judge of the circuit court was not on the bench when the case was tried.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

D. Turpie and D. P. Baldwin, for appellants.

G. T. Wickersham, S. E. Perkins, O. F. Baker, and S. E. Perkins, Jr., for appellees.

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railroad company to run any locomotive or cars over any of the railroad tracks within the corporate limits of said city, at a faster rate than four miles per hour." Another section provided that "any conductor, engineer, or other person having control of any engine, car, or railroad train, who shall violate any of the provisions of this ordinance, shall, upon conviction thereof before the mayor of said city, be fined not exceeding twenty dollars."

Held, that in a complaint in the mayor's court against an engineer, to recover a penalty of him for running a locomotive under his control at a faster rate of speed than four miles per hour within said city, reference should be made to both of said sections by their numbers and the date of adoption, and a complaint referring only to the former section was insufficient.

SAME.—Power to Regulate Speed of Trains.—Constitutional Law.—Such an ordinance is not inconsistent with the statute law of this State, but is plainly authorized by section 53 of the general act of 1867 for the incorporation of cities. Nor is such an ordinance unconstitutional.

SAME.—Mail Trains.—A prosecution for a violation of such an ordinance cannot be defended on the ground that the railroad company was engaged in carrying the mail under a contract with the United States and was required by said contract to transport the mail within a prescribed time, which could not be done if the towns and cities through which the road ran were allowed to regulate the speed of trains in passing through them.

SAME.—Territorial Jurisdiction.—Such an ordinance applies equally to all the territory within the corporate limits over which a railroad runs, including that not laid off in lots, streets, or alleys, or occupied with buildings, and including lands owned by railroad companies.

APPEAL from the Johnson Circuit Court.

BUSKIRK, J.—The city of Franklin prosecuted the appellant before the mayor of such city for the violation of a city ordinance. The complaint reads thus:

"The city of Franklin complains of Mathew Whitson, and says, that on the second day of March, 1868, the said Mathew, within the corporate limits of said city of Franklin, had control of a certain locomotive in and upon the track of the Jeffersonville, Madison and Indianapolis Railroad; that the said Mathew was then and there the engineer on the said locomotive, and then and there unlawfully ran said locomotive over the track of the said railroad, within the corporate limits of the said city of Franklin at a faster rate of speed than four miles an hour, contrary to section one of ordinance twelve of the ordinances of said city passed by the common

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council thereof on the 4th of November, 1861. Wherefore the said city demands judgment for twenty dollars."

The appellant appeared before the Mayor and demurred to the complaint, which was overruled. He then answered in four paragraphs. The appellee demurred to the second, third, and fourth paragraphs, and the demurrer was sustained. There was a trial before the mayor resulting in a finding and judgment for the plaintiff. The defendant appealed to the circuit court. In that court, the defendant demurred to the complaint on the following grounds: First, because the complaint does not state facts sufficient to constitute a cause of action; second, because the ordinance mentioned therein is inconsistent with the statute laws of Indiana; third, because the ordinance mentioned in the complaint is unconstitutional and void.

The demurrer was overruled, to which ruling the appellant excepted, and assigns this as the first error. The complaint refers to section one of ordinance twelve, passed November 4th, 1861, which section reads as follows:

"That it shall not be lawful for any railroad company to run any locomotive or cars over any of the railroad tracks within the corporate limits of said city at a faster rate than four miles per hour."

This action is not against the railroad company, but against an engineer in the employment of such company. The first section contains no penalty for the violation of its provisions, but if it did, it would not apply to the appellant. The appellee admits, in argument, that the first section contains no penalty, but maintains that section four of said ordinance declares who shall be punished, and the extent thereof, and that the reference to section one would also include section four, which reads as follows:

"Any conductor, engineer, or other person having control of any engine, car, or railroad train, who shall violate any of the provisions of this ordinance, shall, upon conviction thereof, before the mayor of said city, be fined not exceeding twenty dollars."

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Section nineteen of the act for the incorporation of cities and towns (approved March 14th, 1867) provides, that in an action to recover a penalty for the violation of an ordinance "it shall not be necessary to file with the affidavit or complaint a copy of the ordinance or section thereof charged to have been violated, but it shall be sufficient to recite in the affidavit or complaint the number of the section charged to have been violated, with the date of its adoption." 3 Ind. Stat. 69.

Section one renders it unlawful for any railroad company to run any locomotive or cars over any railroad track within the limits of the city at a faster rate than four miles an hour, and section four imposes a penalty upon any engineer or person having control of any engine, car, or railroad train, who shall violate any of the provisions of such ordinance. Sections two and three make it unlawful for railroad companies to obstruct streets of such city, or to omit to ring the bell while passing through said city. Section four imposes a penalty for the violation of any of the provisions of sections, one, two, or three. Prior to the passage of the act of 1867, for the incorporation of cities and towns, this court held, that to make a complaint good it was necessary to file with such complaint a copy of the ordinance or section alleged to have been violated. See *Green v. City of Indianapolis*, 25 Ind. 490.

It is now sufficient to refer to the section alleged to have been violated by the number, and to give the date of its adoption. To constitute a good complaint on the ordinance under consideration, it should refer to the section creating the offense and to section four, which imposes a penalty upon persons violating the provisions of such ordinance. Neither one of the sections by itself creates an offense for which an action could be maintained, but when section four is considered in connection with either of the other sections, the two together create an offense and impose a penalty for its violation. We think that the complaint in this case was bad for not referring to section four of said ordinance, as well as section one. See *Kenrick v. United States*, 1 Gallis. 268.

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It is also claimed by the appellant that the complaint is bad because the ordinance is inconsistent with the statute law of this State. There is nothing in the objection. The legislature has in plain and undoubted terms authorized cities and towns to pass ordinances like the one under consideration. The forty-second clause of section fifty-three of the act providing for the incorporation of cities and towns reads thus: "To regulate the speed of railroad trains through the city; and also to provide by ordinance for the security of citizens and others from the running of trains through any city, and to require railroad corporations to observe the same, and also to require such corporations to keep clean the gutters and crossings of the streets along which their railways may pass." 3 Ind. Stat. 88.

It is also claimed that the ordinance of the city is unconstitutional and void.

It is well settled, both on principle and by authority, that the legislature may empower municipal authorities to pass ordinances to regulate the speed of cars through cities; and it is equally well settled that the municipal authorities of cities and large towns have the right to adopt such ordinances without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdictions. NELSON, C. J., in the case of *Buffalo and Niagara Falls R. R. v. City of Buffalo*, 5 Hill, N. Y. 209, says, "A trains of cars, impelled by the force of steam through a populous city, may expose the inhabitants to unreasonable perils, so much so, that unless conducted with more than human watchfulness, the running of the cars" (in that mode) "may well be regarded as a public nuisance." "It has also been held, that a statute giving power to the common council of a city to regulate the running of cars, within the corporate limits, authorizes the adoption of an ordinance entirely prohibiting the propelling of cars by steam through any part of the city." 2 Redfield on Railways 564; *Veasie v. Mayo*, 45 Me. 560; *State v. Tupper*, Dudley, S. C. 135; *Branson v. Philadelphia*, 47 Penn. St. 329; *Philadelphia v.*

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Lombard, &c., R. R. Co., 3 Grant Cas., Pa. 403; *Great Western R. R. v. Decatur*, 33 Ill. 381; *State v. Jersey City*, 5 Dutch. 170.

We hold that the ordinance of the said city is valid and constitutional, but that the complaint was bad because it did not refer to sections one and four of said ordinance.

The defendant answered in four paragraphs. The first was a general denial. The second admitted that the said train ran at the speed mentioned in the complaint, but that the conductor thereof was responsible for the rate of speed, and not the engineer. The third was that the said railroad company was engaged in carrying the mail from the city of Indianapolis to the city of Jeffersonville, and that by the contract with the government, it was required to transport the mail between the said cities within a prescribed time, and that this could not be done if the towns and cities through which said road ran were allowed to regulate the speed of the trains in passing through them.

The fourth paragraph admitted that the train ran through and within the corporate limits of said city at the rate of speed charged in the complaint, but it is averred that the corporate limits of the said city extended two miles in length and breadth; that a large portion of the territory thus embraced within the said corporate limits was not laid off into lots, streets, and alleys, or occupied with houses or any kind of buildings; that at the time complained of in the complaint the said train was running along and over the lands of the said railroad company which were not laid out into lots, streets, and alleys, or occupied with houses, nor was the said train, at the said time, crossing streets or alleys.

The appellee demurred to the second, third, and fourth paragraphs of the answer. The demurrer was sustained, and this ruling is assigned for error. We think the court committed no error in sustaining the demurrer to the answer. The second paragraph amounts to no more than the general denial, and all the matters therein alleged could have been proved under the denial. We are unable to see why the appellant was justified in violating the ordinance of the

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city, from the fact the company was engaged in carrying the mail, under a contract with the federal government. To recognize this as a defense, would virtually deprive the municipal authorities of the power of regulating the speed of trains, which would place the safety of the inhabitants of the towns and cities through which such trains would run at the mercy of those in charge of trains carrying the mail.

The matters alleged in the fourth paragraph of the answer constitute no defense. The jurisdiction of the common council is circumscribed by the corporate limits of the town or city. There can be no doubt that the common council possessed the power to pass the ordinance in question, nor do the facts alleged show that there has been such an abuse of the discretion reposed in the common council as will justify this court in holding the ordinance void. The ordinance in question would have no authority beyond the city limits. The legislature conferred in express terms the power to regulate the speed of trains *within* the corporate limits, and we have seen that the authorities of towns and cities have such power without positive legislation, under the police power. The fact that the railroad owned the lands over which the train was running constitutes no defense, nor could such fact be considered in mitigation of damages.

We are compelled to reverse the case for the defect heretofore pointed out in the complaint.

Judgment reversed, with costs, and cause remanded with directions to the court below to sustain the demurrer to the complaint for the reason that it did not refer to section one and four of said ordinance, and for further proceedings consistent with this opinion.

D. D. Banta, G. M. Overstreet, and A. B. Hunter, for appellant.

C. Byfield, for appellee.

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MEREDITH v. CRAWFORD.

MINOR.—*Suit for Services.*—*Set-Off.*—In an action to recover for work and labor done by the plaintiff for the defendant at the request of the latter while the former was a minor, he may recover whatever such services were reasonably worth, not being bound by any special contract as to the time he was to work or the amount to be paid him for his services; and the defendant may set off against the amount so recovered the reasonable value of necessities furnished the plaintiff during the period of such service, such as food, clothing, schooling, &c.

SAME.—*Evidence.*—On the trial of such an action, the value of clothing furnished by the defendant to the plaintiff being in issue, the defendant asked a witness the following question: "Are you acquainted with the cost of furnishing *necessary* clothing per year for a girl of the age and size of the plaintiff, during the years she resided at the defendant's house?" And the court refused to allow the question to be answered.

Held, that this was not error.

INSTRUCTIONS TO JURY.—*Written.*—*Verbal Explanations.*—Where, upon the trial of a cause by a jury, the court is requested, at the proper time, to instruct the jury in writing, if the court accompanies its instructions with any verbal explanations, comments, and remarks, though not inconsistent with the law as set forth in the written instructions and in no way rehearsing the evidence, this will constitute a good cause for granting a new trial, on the motion of the party making such request.

APPEAL from the Rush Common Pleas.

DOWNEY, J.—This action was brought by the appellee against the appellant for work and labor done and performed extending through a period of several years. The plaintiff was an infant during most if not all the time. The defendant resisted the claim by a general denial, and by special paragraphs alleging, in substance, that the plaintiff, while she was in his family was there as a member of the family, and not for wages; that during the time, he had furnished her with boarding, clothing, and schooling, as he did the other members of his family, which were worth one hundred dollars a year, and which he proposed to set off against her claim for wages. He also pleaded the statute of limitations. There was a reply to these special paragraphs, a trial by jury, verdict for the plaintiff, motion for a new trial overruled, and judgment.

84	399
134	647

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Several points are presented, all of which arise out of the assignment of error that the court refused to grant a new trial on the motion of the defendant. The plaintiff, having been an infant at the time, was not bound by any special contract as to the time that she was to work, or the amount to be paid to her therefor. *Dallas v. Hollingsworth*, 3 Ind. 537; *Wheatly v. Miscal*, 5 Ind. 142, and cases there cited.

She might, therefore, recover of the defendant, whatever her services were, under the circumstances, reasonably worth; at the same time being bound to pay for such necessities as she received from the defendant, such as food, clothing, schooling, &c., what they were reasonably worth.

A question is discussed by counsel with reference to the ruling of the common pleas in refusing to allow certain questions to be answered which were propounded to some of the witnesses by the defendant. One of them was this: "Are you acquainted with the cost of furnishing necessary clothing per year for a girl of the age and size of the plaintiff, during the years she resided at defendant's house?"

We think this question and the others, which were similar to it, were objectionable. The proper way to prove the value of the clothing would, it seems to us, have been to prove what articles of clothing were furnished, and what they were worth. Perhaps, if this could not have been done, some one who saw how she was clad might have been allowed to state what it would have been worth to furnish such clothing. The question, by referring to *necessary* clothing, was too general and indefinite.

Objection is made to some of the instructions given. The evidence is not in the record, and we cannot say that the instructions are not correct.

It appears, however, that the court was requested, at the proper time, to give all instructions to the jury in writing, and also that in giving written instructions, in the language of the bill of exceptions, he accompanied them "with verbal explanations, comments, and remarks not inconsistent with the law as written, and in no way rehearsing the evi-

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dence," and when the jury had failed to agree and returned into court for further directions, the request to instruct in writing being repeated, he again read to them the written instructions "accompanying the same with many verbal explanations, remarks, and comments, illustrative of the same principles of law read to them in the charges."

Counsel for the appellee, in attempting to justify the course pursued by the court, supposes that to give a charge upon a separate and distinct proposition orally, after having been requested to instruct in writing, would be erroneous; but that when the court only explains some point or word which may be left in doubt by the written charges, this is not error.

We cannot agree to this. When such request is made, it is the plain duty of the court to instruct in writing, abstaining from any oral explanations, comments, or modifications of the charge. *The Toledo and Wabash Railway Co. v. Daniels*, 21 Ind. 256, and cases therein cited.

The judgment of the common pleas is reversed, with costs, and the cause remanded.

L. & W. O. Sexton and W. Cassady, for appellant.

B. F. Claypool, B. L. Smith, and A. B. Campbell, for appellee.

TYNER and Another v. ADAMS.

ASSIGNMENT OF ERRORS.—*New Trial*.—Where the overruling of a motion for a new trial is not assigned as error, the Supreme Court will not consider any error properly constituting a cause for a new trial, though it be assigned as error.

APPEAL from the Franklin Circuit Court.

WORDEN, J.—This was an action by the appellee against

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the appellants to foreclose a mortgage. Trial by the court; finding and judgment for the plaintiff, a motion for a new trial being overruled.

There is no assignment of error upon any ruling of the court upon the pleadings in the cause, nor upon the ruling of the court in overruling the motion for a new trial. The errors assigned are all such as were proper to be considered on a motion for a new trial, and as no error is assigned on the ruling upon that motion, the record presents no question for our consideration. This was decided several times by the late court, and the decisions have been followed several times by the court as at present constituted.

The judgment below is affirmed, with costs and five per cent damages.

ON PETITION FOR A REHEARING.

WORDEN, J.—The counsel for the appellants have filed an earnest petition for a rehearing in this cause, and insist that the assignments of error are sufficient to raise the questions involved in overruling the motion for a new trial, although the overruling of that motion is not assigned for error.

The counsel say in their petition that they “do not think that the late court ever held that, notwithstanding the errors assigned in this court were contained in the motion for a new trial, yet that there must be a special assignment of error on the overruling of said motion.”

We quote here an opinion of the “late court” on this subject, in the case of *Herrick v. Bunting*, 29 Ind. 467.

“ELLIOTT, J.—The errors assigned in the case relate exclusively to matters properly presented as causes for a new trial. A motion for a new trial was made and overruled, but that ruling is not assigned for error. The questions discussed by the appellant’s counsel are therefore not properly before us, and hence we cannot pass upon them.”

To the same effect are two other cases in the same volume, decided by the late court, viz.: *Whitinger v. Nelson*, 441;

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Caldwell v. Asbury, 451. Again, in the case of *Stilwell v. Chappell*, 30 Ind. 72, the same court say, "There are a number of questions argued in the brief by appellant's counsel, but as they all should be included in a motion for a new trial, and no error is assigned upon the action of the court in overruling such a motion, we cannot consider them without a disregard of the law." Still later, in the case of *Lingerman v. Nave*, 31 Ind. 222, the same court say, "The only errors complained of relate to matters occurring on the trial, and for which a new trial was prayed; but the action of the court in overruling the motion for a new trial is not assigned for error. No question, therefore, is properly raised by the assignment of errors." There may be, and probably are, other cases to the same effect decided by the late court, but the above will show sufficiently the views of that court on the subject. These decisions are, of course, generally known to the profession, and establish the practice in this respect. In following them, we are not originating any new departure, but are treading in the beaten path of our predecessors. We have already, in quite a number of unreported cases, followed these cases. We are content with them. They are founded, as we think, on a correct theory of the practice under the code. They furnish the established rule of practice, and we have no inclination to overrule them, or change the practice in this respect.

The petition for a rehearing is overruled.

W. Morrow and *N. Trusler*, for appellants.

R. M. Goodwin and *L. Howland*, for appellee.

DAVIS v. LUARK.

APPEAL.—Justice of the Peace.—Where a party against whom judgment has been rendered by a justice of the peace has been granted leave to appeal to

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the court of common pleas after the expiration of thirty days, under section 68, 2 G. & H. 597, and he fails to perfect his appeal by having the order to the justice to certify up the case issued and served, and by causing the justice to make out a transcript of the proceedings and judgment before him and file it, with the original papers, in the office of the clerk of the common pleas, within a reasonable time, and until the case has been regularly called for trial, the appeal may be dismissed on motion of the adverse party.

WITNESS.—*Party.—Continuance*—A continuance should not be granted on the ground that a party to the action is absent from the county, and his attorney does not know where he is, and that it appears he is needed as a witness on his side of the case.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—Luark sued Davis before a justice of the peace. By some misunderstanding as to the time of trial, the parties did not both get there at the same time. Judgment was rendered against Davis. He alleges that he knew nothing of the judgment having been rendered until after the lapse of thirty days, when the constable informed him that he had an execution in his hands issued on the judgment. Davis made an application to the common pleas to be allowed to appeal under 2 G. & H. 597, sec. 68, which was granted and the appeal ordered on the 3d day of July, 1867, and bond filed on the 10th day of the same month. At the June term of said court, in the year 1868, the cause was regularly called for trial, when Davis was found to be absent, and his counsel made an effort to have the case continued, on account of his absence and the fact that he was needed as a witness on that side of the case; which motion the court overruled. It appeared that he was absent from the county, and his attorney did not know where he was. Upon examination it was found that the rule on the justice to certify up the case had not been issued and served, and there were none of the original papers on file, or any transcript of the proceedings before the justice of the peace. Thereupon the counsel for Davis asked for time to cause the papers to be obtained and filed, while the counsel for Luark moved to have the appeal dismissed. The court refused to allow the time asked for, and sustained the motion of Luark, and dismissed the appeal.

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It was the duty of Davis to see that his appeal was perfected by having the order issued and served and causing the justice of the peace to make out and file the transcript of the proceedings and judgment before him, with the original papers, in the office of the clerk of the common pleas. This he should have done in a reasonable time.

It was his duty also to have been in attendance or to have furnished his deposition if he wished to have his evidence used on the trial. *Yater v. Mullen*, 24 Ind. 277.

We cannot say that the court erred in dismissing the appeal. Judgment affirmed, with costs.

J. W. Gordon and *W. March*, for appellant.

W. W. Woollen, Jr., for appellee.

BRAGG and Others v. THE BOARD OF COMMISSIONERS OF RUSH COUNTY and Others.

SOLDIERS.—Bounties.—Under a call of the President for volunteer soldiers, the board of commissioners of a county by an order agreed to pay a certain bounty to each of a certain number of men, or as many as might be necessary to free the county from a draft under said call, providing that the *bona fide* citizens of the county were “to have the preference before outsiders” were paid. And it was provided that said bounty should be paid by the treasurer upon the order of the county auditor, to be issued when the volunteer should have been mustered into the service of the United States; and that the certificate of the mustering-in officer should be sufficient evidence to authorize the auditor to issue the order.

Held, that where a person, on the faith of this promise, enlisted, was mustered into the service, and was credited to a certain township of said county, and thereby filled said quota and discharged said county from said draft to the extent of one man, he thereby became entitled to said bounty.

Held, also, that said certificate of the mustering-in officer was merely evidence, the presentation of which to the auditor was necessary to authorize him to audit and allow the claim and issue his warrant on the treasurer for the amount thereof, but not necessary to confer the right to the bounty.

Held, also, that where the auditor refused to issue said warrant upon presenta-

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tion by said volunteer, before said quota had been filled and before all the bounties provided for had been paid to other parties, of a certificate of the mustering-in officer showing the muster in of said volunteer, but not showing that he was accredited to said county, and said commissioners afterwards refused to pay said bounty upon request of said volunteer, he was entitled to recover the amount of said bounty in an action therefor against said board of commissioners, although he did not present to said auditor a certificate of the mustering-in officer in the form required by said order until after said quota had been filled and after all the bounties provided for in said order had been paid to other volunteers.

Held, also, that said order should be construed to mean that citizens of said county entitled to bounties under said order should be paid before those, who, residing out of the county, enlisted in accordance with said order; and not that the latter class should never be paid.

JUDICIAL NOTICE.—Townships.—The Supreme Court does not judicially know the names of the townships composing a county in this State.

APPEAL from the Union Circuit Court.

DOWNEY, J.—This action was brought by the appellants against the appellees to recover two hundred dollars for each of them, which they allege they were entitled to as bounty for having entered the United States military service at the instance of the county of Rush.

Sundry orders of the board of commissioners of that county are set out in the complaint. On the 10th day of November, 1863, the board ordered that there should be paid out of the county treasury to every man who should volunteer for three years or during the war, in Rush county, and for whom the county should be credited on the call then made, the sum of two hundred dollars.

It was further ordered that said sum of two hundred dollars should be paid by the treasurer upon the order of the county auditor, to be issued when the volunteer should have been mustered into the service of the United States; and the certificate of the mustering-in officer should be sufficient evidence to authorize the auditor to issue the order. The offer of this bounty was to cease when the quota of the county was filled, or at farthest on the 4th day of January, 1864.

On the 26th of December, 1863, it was ordered in addi-

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tion to, and in explanation of, the former order, that whenever the auditor and treasurer are both satisfied that the person claiming the bounty has been duly enlisted and mustered into the service and credited to the county on her quota under the late call, they might issue the order and pay the bounty under the order of November 10th.

On January 4th, 1864, it was further ordered that a bounty of two hundred dollars be paid out of the county treasury for all the men who may be credited on the quota of said county under the present call for three hundred thousand, in the following manner:

Each township might furnish its own men and draw its portion of county bounty in proportion to the number of men furnished by it under the call, at the rate of two hundred dollars for each man that it shall be obliged to furnish under the draft, the amount to be drawn by the agent of the township on presenting to the county auditor the certificate of the mustering officer showing that the soldier has been mustered in and credited to the township. But any volunteer might draw the money himself on presenting the proper certificate accompanied by an order from the township agent directing the auditor to pay it and charge it to the township.

The above bounty to be paid to the volunteer himself, or to the family of the man who might be drafted and should go into the service, or to the principal who should put in a substitute, on presenting the proper certificate as above.

And in February, 1864, the board made this order: "The board agree to pay to one hundred and fifty-five men, or so many as may be necessary to clear the county from a draft under the late call, the sum of two hundred dollars each. Said bounty to be paid to veterans who re-enlisted and are credited to the county, and also to those who enlisted under the former call for three hundred thousand and have not received their bounty. And it is expressly ordered that *bona fide* citizens of the county are to have the preference before *outsiders* are paid. And said bounty is to be paid under the same rules and regulations under which the former bounty

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was paid, and the orders made at that time are made a part of this order.”

The plaintiffs then allege that in order to reduce said quota of one hundred and fifty-five men, and discharge the citizens of the county from the said impending draft, the plaintiffs and each of them consented and agreed at the request of the defendants to volunteer into the service of the United States and to be credited to the township of Rush in said county, to fill said quota, and that the plaintiffs and each of them were credited to said township, and thereby filled the quota and discharged said county of Rush from said draft to the number of four men, in consideration that each of the plaintiffs was to have the sum of two hundred dollars appropriated by the said board.

They further allege that immediately after being mustered into the service each procured a certificate from the acting assistant provost marshal general, copies of which are made part of the complaint, and on the 28th day of February, 1864, presented the same to the auditor of said county, and requested him to issue the orders on the treasurer for the bounty, but the auditor refused to issue the orders, and the board of commissioners [and the other defendants named have wholly failed and refused, and although the defendants have since the demand on the auditor been frequently requested by the plaintiffs to pay said bounties, they and each of them have wholly failed to do so, to the damage of the plaintiffs one thousand dollars, &c.

There was a demurrer to the complaint which was overruled, and the defendants then waived all objections to the complaint on account of misjoinder of parties plaintiffs and defendants.

The defendants answered, first, by a general denial; and secondly, that at the time the plaintiffs presented their certificates to the auditor, that they had been mustered into the service and credited to the county as required by the board of commissioners, the quota of the county had been filled, and the order for the payment of the volunteers as provided

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by the order of said board had been issued and paid by the county.

There was a demurrer to this second paragraph of the answer, which was overruled, and an exception entered.

The plaintiffs replied to this paragraph of the answer, first, by a general denial; and second, that they did, before the quota of the county was full, present to the auditor a certificate that they had been duly mustered into the service, and so informed said auditor; but that the certificates were not in the form required by the orders made by the commissioners; that they afterwards procured the certificates required in said orders, and presented them to the auditor and demanded payment of the bounty; and therefore they say that the auditor had actual notice that they had enlisted and were credited to the county before the quota had been filled, and before the bounties had all been paid to other parties.

There was a demurrer by the defendants to the second paragraph of the reply, which was sustained, and the point reserved.

The cause was then tried by the court, on an agreed statement of the facts, and there was a finding for the defendants, and, notwithstanding a motion for a new trial, judgment was rendered in accordance with the finding.

The certificates filed with the complaint do not show that the plaintiffs were credited to Rush county. They are all in the same form, and read thus:

"STATE OF INDIANA,

"Head Quarters Superintendent Recruiting Service,

"INDIANAPOLIS, Feb. 27th, 1864.

"This is to certify that John W. Bragg, a recruit for the 90th Reg. Ind. Vols., was enlisted on the 26th day of February, 1864, and duly mustered into the service of the United States on the 27th day of February, 1864, and that, according to the description book of recruits, his residence at the time of his enlistment was Rush township, Rush county, Indiana.

"By order of COL. CONRAD BAKER,

"A. A. P. M. G. and Supt. Vol. Rect. Ind."

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Were it not for the statement in the complaint, "that the plaintiffs and each of them were credited to said township and thereby filled the quota and discharged said county of Rush from said draft to the number of four men, in consideration that each of the plaintiffs was to have the sum of two hundred dollars appropriated by the said board," we should be compelled to hold the complaint bad. But, after some hesitation, we have concluded that on account of this allegation it may be good, notwithstanding the failure of the certificate to show that the plaintiffs were credited to the county. We must regard the allegation, that they were credited to Rush township, Rush county, Indiana, as a sufficient allegation that they were credited to the county.

We cannot know, judicially, if such is the fact, that there is no such township as Rush, in Rush county. The townships are formed by the board of commissioners, and are not created, bounded, and named by the legislature, as counties are.

The overruling of the demurrer of the plaintiffs to the second paragraph of the answer is assigned for error.

In support of the ruling of the court, the counsel for the appellee insists that to entitle the appellants to the bounty, it was not only necessary for them to present the certificate mentioned in the orders of the commissioners, but that they must have presented it before the quota of the county had been filled.

We do not regard the presentation of a certificate to the auditor as a condition precedent, the performance of which was necessary to confer the right to the bounty.

By the order of February, 1864, the commissioners said, we "agree to pay to one hundred and fifty-five men, or so many as may be necessary to clear the county from a draft, under the late call, the sum of two hundred dollars each."

If the plaintiffs, on the faith of this promise, enlisted, were mustered into the service, and credited to the township, and as they allege, thereby filled said quota, and discharged said county from said draft to the number of four men, we think

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they had done all that was required of them to give them a valid claim against the county for the promised reward.

The production of the certificate was necessary to authorize the auditor to audit and allow the claim and draw his warrant for the amount on the treasurer. The provision in the order of the board allowing the auditor to allow the claim and draw his warrant for it on presentation to him of certain evidence, was a provision which may have been adopted for the convenience of the board, and to save them the trouble of having to pass on and allow the claims themselves. It could make little difference to the claimants whether they got their money in the one way or the other.

A point is made with reference to that part of the order of February, 1864, which says, "and it is expressly ordered that the *bona fide* citizens of the county are to have the preference before outsiders are paid." But we cannot see how this preference of the citizens, until they shall have been paid, can be construed to mean that the other class shall never be paid. We must construe it to mean that the citizens, who were to contribute the means, by the payment of taxes, to pay the bounties, should be paid before those who might enlist and yet not reside in the county.

What we have said shows that the demurrer to the second paragraph of the reply should have been overruled.

We doubt whether the assignments of error, with reference to the facts of the case, are such as to justify or require us to examine them, and we think it not necessary that we should do so.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the second paragraph of the answer, and to grant the parties leave, if they desire to do so, to reconstruct the issues.

J. Stafford and *D. Moss*, for appellants.

L. & W. O. Sexton and *B. F. Claypool*, for appellees.

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TEMPLE and Others v. IRVIN and Others.

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152	587

84	412
157	823

PRACTICE.—*Relief from Judgment Taken Through Mistake.*—A proceeding to correct an alleged mistake in a partition suit must be commenced within two years after final judgment in the partition suit.

SAME.—*Commencement of Suit.*—The commencement of a suit or the institution of proceedings on motion includes the issuing of process or notice to bring the defendant into court.

APPEAL from the Harrison Circuit Court.

WORDEN, J.—This was a complaint by the appellants against the appellees to correct an alleged mistake in the proceedings in a partition suit in the same court. The alleged mistake in the partition, briefly stated, consists in this. The land to be parted consisted in part of river bottom land, and in part of upland. The commissioners in making the partition determined to set off to the plaintiff herein twenty-two acres and a fraction of the upland, and ninety acres and a fraction of the bottom land; and to Camilla Irwin, one of the parties interested, twenty-two acres and a fraction of the upland, and seventy-four acres of the bottom land, as their respective and just shares. The surveyor whose services were employed in making the partition, was directed by the commissioners to establish the corners, boundaries, courses and distances of each share, so that each party would have the quantity of each kind of land allotted to him, and he made a plat of the land, describing each one's share by metes and bounds, which the commissioners, supposing it to be right, reported to the court as their division of the land, and their report was confirmed by the court.

It turns out, however, that according to the descriptions of the land thus assigned to the plaintiffs herein, there are but seventy-four acres of the bottom land instead of ninety and a fraction; and in the portion assigned to Camilla Irwin there are about eighty-eight acres of the bottom land instead of seventy-four, as was intended by the commissioners. The object of the suit was to correct this mistake.

After the partition, Camilla sold her share to George Kimball, who was made defendant. Kimball demurred to the complaint, and his demurrer was sustained. This ruling presents the only question raised for our consideration.

We are not favored with any brief for the appellants, and are therefore, not advised upon what ground they claim that the action can be maintained. The appellee, however, has filed a brief in which he urges a number of objections going to the merits of the cause, as well as the objection that the suit was instituted too late. We have concluded that the latter objection is well taken; and it will, therefore, be unnecessary to examine any other question in the cause.

The action, if it can be maintained all, must be maintained under the provisions of the 99th section of the code, as amended March 4th, 1867. Acts of 1867, p. 100. This section as amended requires the court to "relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise or excusable neglect, and supply an omission in any proceeding on complaint or motion filed within two years."

The final judgment in the partition suit, confirming the report of the commissioners, was rendered on the 28th of March, 1867. This complaint to correct the alleged mistake was filed in September, 1869, but it purports to be an amended complaint, and recites that the original complaint had been filed on the 26th of March, 1869. The original complaint is not in the record, but we may assume for the purposes of this decision that it was filed at the time named, and was for the correction of this alleged mistake. We may assume, in short, that the complaint to correct the mistake was filed as early as March 26th, 1869. This assumption, if not correct in point of fact, is most favorable to the appellants. The summons in the cause, for Kimball and others, was issued on the 26th of April, 1869, and seems to have been served on him on the 3d of June following.

We think the statutory provision above quoted must be construed in accordance with its evident spirit and intent,

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which, it seems to us, is to require such relief as is contemplated, to be granted, where a suit is commenced, or proceeding on motion instituted, for that purpose within the time limited therein. The commencement of a suit, or the institution of proceedings on motion, includes the issuing of process or notice to bring the defendant into court. 2 G. & H. 59; *Hancock v. Ritchie*, 11 Ind. 48. It was not intended, by the provision in question, to permit the party seeking relief to file his complaint or motion therefor, and then procrastinate indefinitely the taking of steps to bring the adverse party into court, until perhaps witnesses are dead, or other circumstances have intervened to the prejudice of the opposite party. If a party seeking such relief, having filed his complaint or motion therefor within the two years, can issue process or notice after the expiration of that period, he may do so at any indefinite time thereafter, and in this way bring the opposite party into court to correct alleged mistakes, &c., in a judgment, at any indefinite length of time after it was rendered. This we hold cannot be done. We think that in order to obtain relief under the provision cited, the party applying for it must not only file his complaint or motion therefor within the two years, but he must also, within that period, issue his process or notice to bring the opposite party into court. In other words, his suit or proceeding for that purpose must be *commenced* within the time limited. This is in harmony with the spirit of the law, and with general principles applicable to analogous cases.

Here the process was not issued until nearly a month after the expiration of the time limited.

The judgment below is affirmed, with costs.

G. V. Howk, T. C. Slaughter, and C. D. Howk, for appellants.
S. K. Wolfe, for appellees.

Hyatt, Administrator, v. Mavity, Executor.

HYATT, Administrator, v. MAVITY, Executor.

PRACTICE.—*Claim Against Decedent's Estate.*—Where a complaint shows on its face that the action is to recover a claim against the estate of decedent, and the proceeding has been commenced, not by filing a claim, but as an ordinary action, the suit should be dismissed on motion.

APPEAL from the Ripley Common Pleas.

PETTIT, C. J.—The appellee, who was plaintiff below filed his complaint in three paragraphs, first, that his decedent, on the 22d day of August, 1864, deposited with appellant's decedent, six hundred dollars in cash, and that the same is due and unpaid; second, that on the same day there was placed in his hands three notes of thirteen hundred dollars, which he agreed to account for, but did not; the third paragraph is for a horse and cow, worth one hundred and seventy dollars. The defendant filed a written motion to dismiss the suit because the complaint shows on its face that it is a claim against the estate of a decedent, was not filed as a claim, but was commenced by a complaint and summons, as an ordinary action. The motion was overruled, and exception. This ruling is assigned for error, and is the only one we need notice.

This motion ought to have been sustained. The only way to collect such a claim as this, is to follow sec. 62, p. 501, and sec. 66, p. 503, 2 G. & H. See *Ratcliff v. Leunig*, 30 Ind. 289; *Braxton, Adm'r &c., v. The State, &c.*, 25 Ind. 82; *Martin v. Asher's Adm'r*, 25 Ind. 237; *Pully, Adm'r, v. Perfect*, 30 Ind. 379.

The judgment is reversed at the costs of the appellee, with instructions to the court below to sustain the motion to dismiss the case.

J. W. Gordon, J. O. Cravens, and W. D. Ward, for appellants.

E. P. Ferris and H. T. Lipperd, for appellee.

Brush v. Raney.

BRUSH v. RANEY.

PRINCIPAL AND SURETY.—Contract.—Pleading.—Evidence.—A promissory note was executed by A. and B., the latter styling himself “collateral security.” Suit on the note by the payee against B., A. being deceased.

Held, that a parol agreement between the payee and B. that the latter should pay the note only in case it could not be made of A., if contemporaneous with the making of the note, could not be shown in defense because of the rule against the admission of parol evidence to vary or contradict a written instrument, and if subsequent to the note, could not be sustained without a consideration therefor being shown.

SAME.—Statute Construed.—The statute (2 G. & H. 308, sec. 674) which enables a surety to have an order of the court that execution shall be first levied upon the property of his principal, is not applicable in such an action brought against a single defendant.

PLEADING.—Consideration.—To show a consideration for an agreement, in a pleading, it is not sufficient to allege that the agreement was for a valuable consideration; but the facts with reference to the consideration must be set out.

PROMISSORY NOTE.—Without Date.—In a suit on a promissory note without date, but having seven months from its execution to run, the complaint set forth the note and alleged that it was made at a certain date, being more than seven months prior to the commencement of the action.

Held, that the complaint sufficiently showed that the note was due when the suit was commenced.

APPEAL from the Ripley Common Pleas.

DOWNEY, J.—This action was commenced by the appellee against the appellant on a promissory note, executed by the latter and one Allen, deceased, to the former, the defendant styling himself “collateral security.”

Answer, first, the general denial; second, payment before suit brought; third, that the defendant is only “collateral” security on the note, that the estate of Allen is solvent, that there is one thousand dollars of personal and real estate in Ripley county, and was at the time of commencing this action, and that by contract with the plaintiff, for a valuable consideration, he was to pay the same only in case it could not be made off Allen, and asks that the property of Allen may be first exhausted after the question of suretyship is tried; fourth, that he is only collateral security on the note, that

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the plaintiff accepted the note with the full understanding and agreement that he was to look to defendant, Brush, for his pay only in case the money could not be made off the principal, and that the heirs of Allen all live in Ripley county and have for five years, and that Allen has unincumbered personal and real property of the value of one thousand dollars, and that his estate is solvent. Wherefore, the defendant asks that the plaintiff be required to answer as to said question of suretyship, and if the facts as stated be found to be true, that the court will compel the plaintiff to exhaust the property of the principal before he is compelled to pay the same.

Reply to the second paragraph of the answer. Demurrer to the third and fourth. Demurrers sustained, and exception taken. The defendant then withdrew the first and second paragraphs of his answer, and there was final judgment rendered for the plaintiff.

The errors assigned are the sustaining of the demurrers to the third and fourth paragraphs of the answer, and it is insisted in argument that the complaint is bad.

The third paragraph does not state whether the contract referred to was made at the date of the note, or subsequently. If it was made at the date of the note, it cannot be sustained, because it violates the well known rule that parol evidence cannot be admitted to vary or contradict a written instrument.

If it is to be understood that it was made subsequently to the date of the note, we think it cannot be sustained, because it does not set out any consideration for the agreement. It is true that it says it was for a valuable consideration. But it is the province of the court, and not of the pleader, to decide whether the consideration was a valuable one or not. The facts with reference to the consideration should have been set out. *Robinson v. Barbour*, 5 Blackf. 468.

The fourth paragraph is evidently objectionable, because it sets up a contemporaneous parol agreement which materially changes the terms of the note.

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Neither of these paragraphs of the answer can be sustained under the statute which enables sureties to have an order of the court that the execution shall be first levied on the property of principal. That statute applies only where an action is brought against two or more defendants, &c. 2 G. & H. 308, sec 674.

As the promissory note on which the suit is brought is not dated, and the complaint does not, in terms, allege, that it was due when the action was brought, it is urged that the complaint is bad. But the complaint, alleges that the note was made on the first day of August, 1868. It had seven months to run. The suit was commenced on the second day of March, 1869. The complaint thus sufficiently shows that the note was due when the suit was commenced.

The judgment is affirmed, with ten per cent. damages and costs.

E. P. Ferris, and H. T. Lipperd, for appellant.

WEST v. FORSYTHE.

GUARDIAN AND WARD.—*Guardian's Bond.*—*Removal of Guardian.*—The failure of a guardian to give a bond sufficient to secure to his ward, when the period of his wardship shall terminate, the amount of a pension coming to the ward from the government, is a sufficient cause for the removal of the guardian, without regard to the fact that the amount of the pension may be needed for the maintenance and education of the ward.

APPEAL from the Clinton Common Pleas.

WORDEN, J.—This was an application by the appellant to remove the appellee, as guardian of the persons and estates of Mary A. Stevenson and William F. Stevenson. Trial by the court, resulting in a finding and judgment for the defendant.

The case comes before us exclusively on the evidence,

which is embodied in a bill of exceptions. The following general facts may be gathered from the evidence.

Thomas J. Stevenson, the father of the wards in question, was killed in the service of the country as a soldier, in the late civil war, leaving a widow and the two children above named. In November, 1865, the appellee, Forsythe, and the widow of the deceased intermarried. At the time of the marriage, the widow was drawing a pension from the United States, but the wards succeeded to the pension after the marriage. It is stated in the complaint that the annual pension coming to the wards is one hundred and forty-four dollars, but the proof does not show the precise amount. It is also stated that they will be entitled to it until they arrive respectively to the age of sixteen years.

On the 27th of November, 1866, Forsythe applied to the clerk of the court below for letters of guardianship for said children, but in his verified statement in writing for that purpose, he made no allusion whatever to the pension due said children. Possibly this was unnecessary, as not coming within the liberal terms of section four of the act on the subject. 2 G. & H. 565.

The clerk issued the letters, and took a bond from Forsythe, with one Nehemiah C. Lovett as his surety, in the penal sum of five hundred dollars. Lovett, at the time the bond was given, was in quite precarious circumstances, and at the time this suit was tried, he had become utterly insolvent and had left the State. From the statement of Forsythe, in his application for letters, it appears that Mary A. was born August 7th, 1858, and William F., January 15th, 1861; so that each has several years' pension yet to draw.

It appears that the two wards are living with Forsythe, and that they are provided for and schooled about like other children in that portion of the State; but the evidence has a strong tendency to show that Forsythe, while he is an industrious and temperate man, is hasty, choleric and irritable, and not well fitted to stand *in loco parentis* to these children. One witness testifies that he heard and counted five blows

West v. Forsythe.

inflicted by Forsythe, upon some one whom he did not see, but who, under the circumstances detailed, could have been no one but the boy, at the distance of thirty rods. His opinion is that the blows were inflicted with a switch.

Another witness says, "I know the children, and am satisfied he is too severe on them. He presses down on them too close. He is excitable and easy to get mad, and has a vicious way of talking. The boy is a good worker. I don't hardly know whether he pays his way or not, but if any boy can, he does."

Another witness said, "the defendant told him the children were thick-headed like their father; that he had whipped the girl, but she would not mind."

Still another said, "I saw him whip the boy once last spring with a bridle. He whipped him harder than I thought was proper."

Yet another said, "I think he was too hard on them. I saw him whip the boy once pretty heavy. I thought it was more than the child deserved."

Another witness speaks thus: "I am acquainted with the defendant and his wards. He is sober and industrious. He is crabbed and easily excited, and often storms, blusters and halloos at the children. I never saw him abuse them. I think the children are bad. In some cases severity makes the children worse."

Much evidence was educed as to whether the labor of the children was sufficient for their maintenance.

This evidence had little, if anything, to do with the question involved. Perhaps the defendant was not bound, as their step-father, to maintain the children. His charges for their maintenance, and the services they may perform for him, are matters properly to be considered on the settlement of his account with them as their guardian.

We should, without hesitation, say, on the evidence before us, that the treatment of the children by the defendant, and especially the boy, renders it improper that he should continue to be their guardian, were it not for the domestic rela-

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tion that exists between the defendant and the mother of his wards. The children, it is proved, desire to remain where they are; and if that fact were thoroughly established, it might be regarded as a strong circumstance to show that, on the whole, they had not been very badly treated. But the judgment below will have to be reversed on the grounds which we will now proceed to state, and the case will go back for trial *de novo*, where further evidence can be introduced on this branch of the case, if it is desired.

It is quite clear that Forsythe should not continue to act as the guardian of these children and receive on their behalf the bounty or pension due them from the government, without giving a bond which will be ample to secure it to them when the period of their wardship terminates. It may be that the most or all of it will be needed for their maintenance and education. It may be that they will be maintained and educated by the defendant. But, on the other hand, it may be that their labor, as they grow up, will be sufficient for their maintenance, and that the bounty of the government can be saved to them as a little fund with which to start in life. The interest of the wards requires such bond to be given, and that the guardian be removed on failure to give it. The counsel for the appellee, in their brief, say that he did give an additional bond to the acceptance of the clerk, but the record shows nothing of it.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to grant a new trial.

J. N. Sims and C. Sims, for appellant.

J. Barner and J. Claybaugh, for appellee.

Whitman, Receiver of the Sinnissippi Insurance Company, v. Hall.

WHITMAN, RECEIVER OF THE SINNISSIPPI INSURANCE COMPANY, v. HALL.

MUTUAL INSURANCE COMPANY.—*Assessments.—Suit for by Receiver.—Complaint.*

APPEAL from the Rush Circuit Court.

PETTIT, C. J.—This suit was brought by the appellant against the appellee, to recover certain assessments made by the directors of said company and the Marion Circuit Court, on a premium note given by the appellee for a policy of insurance in said company.

A demurrer for want of sufficient facts was sustained to the complaint, and this ruling is the only error assigned. The appellee has not put himself to the trouble to file a brief or make in any manner a suggestion of any particular reason why, or point on which the complaint is bad.

The complaint shows the organization of the company, the giving of the note for a policy, the assessments on the note, the notice and demand for their payment, legal proceedings in which the franchises of the company were declared forfeited for insolvency, and the appointment of Whitman as receiver, with the powers usually and properly conferred on such officers or fiduciaries of the courts in such cases. We have examined our statutes, forms, and precedents, elementary writers, and adjudicated cases, and have not been able to satisfy ourselves that the complaint in this case is bad. See *Boland v. Witman*, 33 Ind. 34.

The judgment is reversed, at the costs of the appellee, with instructions to the court below to overrule the demurrer, and for further proceedings.

J. E. McDonald and *E. M. McDonald*, for appellant.

B. L. Smith, for appellee.

Manlove, Receiver of the Farmers and Merchants' Ins. Co., v. Scarce.

WHITMAN, RECEIVER OF THE SINNISSIPPI INSURANCE COMPANY, v. AMMONS.

APPEAL from the Rush Circuit Court.

PETTIT, C. J.—This suit was brought to recover the amount of assessments on a premium note given for a policy in said company.

Demurrer to the complaint for want of sufficient facts, &c., sustained, and exception. This ruling is assigned for error, and presents the only question in the case. The appellee has not filed a brief or pointed out any reason why the complaint is bad, and we are not able to discover any. It is in all respects the same as that in *Whitman, Receiver, &c., v. Hall*, decided at this term, *ante*, p. 422.

The judgment is reversed, at the costs of the appellee, with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings.

J. E. McDonald and *E. M. McDonald*, for appellant.

B. L. Smith, for appellee.

MANLOVE, RECEIVER OF THE FARMERS AND MERCHANTS' INSURANCE COMPANY, v. SCARCE.

APPEAL from the Wayne Common Pleas.

PETTIT, C. J.—This record is another blundering and worthless one from Wayne county, in comparison with which the darkneses of Erebus and Egypt were brilliant lights, and the chaos that existed before the creation was perfect order.

We are, however, able to learn from it that the appellant brought suit against the appellee to recover an assessment

Caldwell, Administrator, v. Kernodle.

on a premium note given for a policy in said company. There is only one paragraph of the complaint, which at different times and places is called "the complaint," "the second paragraph of the complaint," "an amended complaint." Which it is we do not know, but we hold it to be a sufficient complaint, and that it shows a good cause of action in such a case. It is in all the essentials like the one in *Whitman, Receiver, &c., v. Hall*, at this term, *ante*, p. 422.

In this, the record shows that a demurrer was filed, but for what cause, or what was done with it, is not shown. Another demurrer the record shows was filed, but for what cause, or was done with it, does not appear; and a third one was filed, because the complaint did not state facts sufficient, &c., which was overruled; and since the defendant had got his hand in, and had become an adept in the art of demurring, he filed still a fourth one for the same cause, which was sustained, and this ruling was excepted to, and is assigned for error in this court. Perhaps the court thought that sustaining the demurrer of the appellee once, out of four times that it was filed, might be merited for his pertinacious adherence to that form or branch of pleading; but it was error in law to do so.

The judgment is reversed, at the costs of the appellee, with instructions to the court to overrule *all* the demurrers to the complaint, and for further proceedings.

L. D. Stubbs, for appellant.

J. Perry, for appellee.

CALDWELL, Administrator, v. KERNODLE.

APPEAL from the Boone Common Pleas.

DOWNEY, J.—This action was brought by the appellant

Gass, v. The State, on the Relation of Clark.

against the appellee on two promissory notes, amounting at the time of the trial to about four hundred and twenty-five dollars.

The defense set up was an account against the intestate which amounted to about six hundred and eighty-five dollars. There was no controversy about the correctness of the notes, while as to some portions of the set-off there were grave doubts as to their correctness. The jury found a verdict for the defendant for six hundred and eighty-four dollars.

It is quite evident from the record that the jury failed to allow the plaintiff the amount of the notes, else they could not have found so much due to the defendant.

There having been a motion for a new trial, and the proper exception taken, we must reverse the judgment.

The judgment is reversed, with costs, and the cause remanded for a new trial.

J. W. Gordon and *P. H. Ward*, for appellant.

A. J. Boone and *R. W. Harrison*, for appellee.

GASS, v. THE STATE, on the Relation of CLARK.

INFORMATION.—*Court of Common Pleas.—Jurisdiction.*—The court of common pleas has jurisdiction of an information in the nature of a *quo warranto* for usurping an office, filed in said court upon the relation of one claiming an interest in the office.

SAME.—*Officer of City.—Contesting Election of.*—The proper mode of attacking the validity of the election of a city officer is by information, there being no provision of law for contesting the election of such an officer.

ELECTION.—*Mode of Conducting.—Directory Statutes.*—Statutes regulating the mere mode of conducting elections are directory, and any departure from the prescribed mode will not vitiate an election, if the irregularity does not deprive any legal voter of his vote, or admit a disqualified voter to vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it.

84	425
130	509
84	425
131	562
34	425
148	211

Gass, v. The State, on the Relation of Clark.

SAME.—Statute Construed.—The reason and spirit of the statutory provision on the subject of contesting elections (1 G. & H. 318, sec. 15), that "no irregularity or malconduct of any member or officer of a board of judges or canvassers shall set aside the election of any person, unless such irregularity or malconduct were such as to cause the contestee to be declared elected when he had not received the highest number of legal votes," are applicable to an election to a city office as well as to a state, county, or township office; and said provision announces a principle of law which prevails independently of the statute.

APPEAL from the Fountain Common Pleas.

WORDEN, J.—This was an information in the nature of a *quo warranto*, filed by the State, upon the relation of Clark, against the appellant Gass, charging that the appellant had usurped the office of Mayor of the city of Attica in said county, and alleging that the relator was entitled thereto. Issues were formed, and the cause was tried by the court, upon an agreed statement of the evidence, and the court found and adjudged that neither Clark nor Gass was entitled to the office, but that the same was vacant, and that each party pay the costs by him made.

Some questions are made upon the pleadings, but it is not important that they should be decided, inasmuch as the finding of the court will have to be reversed, and a finding for the defendant directed, on the agreed statement. A question, however, is made as to the jurisdiction of the court of common pleas in informations of this character, as by the act regulating the same they are only authorized to be filed in the circuit court. 2 G. & H. 323, sec. 750. A later statute, defining and enlarging the jurisdiction of the court of common pleas, extends its jurisdiction to cases of this sort, as we think. 2. G. & H. 22. Again, it is claimed that as the case involves the validity of an election, the remedy of the relator was by contesting the election, and not by a resort to an information. This point would be entitled to greater consideration, if there were any provisions of law for contesting the election of a city officer; but we are not aware of any such provision, and therefore think it clear that the proper remedy was resorted to. We come now to the case as shown

by the agreed statement of the evidence. Attica is a city incorporated under the general law of the State for the incorporation of cities, and is divided into three wards, numbered one, two, and three.

On the 4th of May, 1869, an election was held in said city for mayor (the office being then to be filled by an election), and the relator and the defendant were the only candidates for the office. In the first ward the relator received a majority of two votes, and in the third ward a majority of four votes, over his competitor Gass, and in the second ward Gass received a majority of twenty-five votes over Clark, all of which was properly shown, and the board of canvassers declared the defendant elected by a majority of nineteen, and issued to him a certificate of election; and he filed his bond, took the oath of office, and entered upon the discharge of his duties; that for the purposes of said election, the common council of the city had by resolution appointed one inspector and two judges in each of said wards, who qualified as the board of election for the respective wards; that in the second ward the board of judges appointed one of their own number as clerk at said poll; that after the poll was opened, and after a portion of the electors had cast their ballots, and before the balloting was completed or the result thereof publicly announced, the board took a recess and adjournment, and separated, all of them going away from the place of holding the election in said ward, taking away with them the ballot-box that contained the ballots cast at said election up to that time; that they all remained away for the space at least one hour, viz., from twelve to one o'clock.

In the first ward, the board of judges appointed one of their own number as clerk, and he was the only clerk at said poll. This board remained in session until the vote had been counted and the result publicly announced.

In the third ward, the board of judges appointed one of their own number as clerk, who was the only clerk at said poll. This board adjourned at noon, after ballots had been cast, in like manner as the board in the second ward, but

Gass v. The State, on the Relation of Clark.

they locked up the room in which they were holding the election, leaving the ballot-box therein.

These are the facts agreed upon, slightly condensed, but stated with sufficient fulness to present the entire merits of the cause.

It will be seen that Clark had a majority of only six votes in the first and third wards, and that in the second ward, where Gass had a majority of twenty-five votes, no irregularity whatever is shown except the appointment by the board of one of their number as clerk, and the adjournment at noon as above stated, taking with them the ballot-box. It does not appear that there was any fraud whatever practiced, that any illegal votes were polled, that any legal voter was prevented from voting; nor is there anything to indicate that Gass did not receive a majority of nineteen of the legal votes cast. The law requires, however, that there shall be two clerks appointed, one from each political party; (3 Ind. Stat. 237, sec. 7) and these we think should be other than the inspector and judges. It also requires that there shall be no adjournment or recess until all the votes shall been counted out and the result publicly announced. 3 Ind. Stat. 234, sec. 18.

The question arises whether such a departure from the statute as is shown in this case will render the election void or otherwise. This depends upon the question whether these statutes shall be construed as imperative or directory merely.

To determine this question, we must not lose sight of another statutory provision, on the subject of contesting elections, as follows: "No irregularity or malconduct of any member or officer of a board of judges or canvassers, shall set aside the election of any person, unless such irregularity or malconduct was such as to cause the contestee to be declared elected when he had not received the highest number of legal votes," &c. 1 G. & H. 318, sec. 15.

We do not find this section repealed by any later law on the subject of elections or otherwise, either expressly or by any necessary implication, and we regard it as in full force.

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While it may not, in terms, be applicable to the case under consideration, because this is not a case of the contest of an office provided for in the act, yet its reason and spirit are as applicable to a city as to a state, county, or township office. There is no good reason why one rule should be applied to a state, county, or township office, and another and very different rule to a city office. This statutory provision, however, need not be solely relied upon, as we think it announces a principle of law that would prevail independently of the statute.

It is settled by authority, that statutes regulating the mere mode of conducting elections are directory, and that any departure from the prescribed mode will not vitiate an election, if the irregularity does not deprive any legal voter of his vote, or admit a disqualified voter to vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it. *Cooley Const. Lim.* 617-8, and authorities there cited. We are of opinion that whether we apply the statute above quoted on the subject of contesting elections or the general principles of law to this case, the election of Gass was valid and not rendered void by the departures from the statute above indicated in conducting the election.

The judgment below is reversed, with costs, and the court below directed to proceed in the cause in accordance with this opinion.

M. M. Milford, for appellant.

T. F. Davidson, J. Buchanan, and A. A. Rice, for appellee.

Bowen v. Reed.

BOWEN v. REED.

JURISDICTION.—*Estoppel.*—Suit before the mayor of a city for rent, and an attachment thereunder, on which was seized the property of the defendant, who executed a delivery bond therefor with surety. Upon the defendant's oral motion, on the ground that the title to real estate was involved, the cause was certified to the circuit court, in which the defendant appeared, and, after taking various steps in the cause, withdrew his appearance and was defaulted, and judgment was rendered against him for the debt, and an order was made for the sale of the attached property.

Held, in a suit on said bond, that said defendant and the surety on said bond were estopped to deny the jurisdiction of the circuit court in said attachment proceeding.

APPEAL from the Fountain Circuit Court.

DOWNEY, J.—Bowen sued one Bartlett, before the mayor of Attica for rent, took out an attachment, and seized the property of Bartlett. He, with the appellee as his security, executed a bond for the purpose of releasing the attached property, by which they agreed that the property should be safely kept and delivered to the marshal on a designated day.

On the day fixed for the trial before the mayor, Bartlett, by oral motion, asked that the cause be certified to the circuit court, on the ground that the title to real estate was involved. This motion was sustained, and the cause was accordingly certified to the circuit court. In that court there was judgment against Bartlett by default, which, on his motion, was afterwards set aside. The cause was then continued until the next term, at which term, on the second day thereof, the said Bartlett had an order entered, on his motion, for the publication of the depositions on file. On the third day of the term the defendant withdrew his appearance, was defaulted, and judgment was rendered against him for the debt, with an order for the sale of the attached property.

The property which had been attached not having been delivered according to the terms of the bond, and not having been found, this action was brought on the bond against Bartlett and his security, Reed. After issues were made, the

Nelson v. Myers.

case was tried by the court, and, at the request of the plaintiff, the court stated the facts in writing and the conclusion of law upon them. The facts so found were as we have stated them. The conclusion of law was, that the circuit court had no jurisdiction in the case so certified up by the mayor of the city of Attica, and that the judgment and proceedings in said cause in the circuit court were void, because the case was not taken to the circuit court by appeal.

There was an exception taken to the conclusion of law, and also a motion for a new trial, which was overruled, and judgment rendered for the defendant. The errors assigned involve the correctness of these rulings.

We think the conclusion of law arrived at by the court was not correct. Every principle of law, as well as of justice and honesty, requires that the defendant, after having had the case certified by the mayor to the circuit court, and having appeared in the circuit court, should be estopped to deny the fact which he had alleged in order to get the case certified to the circuit court, or the fact that the circuit court had jurisdiction. The suit was one of the subject-matter of which the circuit court had full and ample jurisdiction. It should have been held that the defendant had conclusively waived any objection as to jurisdiction of his person.

The judgment is reversed, with costs, and the cause remanded.

J. Buchanan, for appellant.

NELSON v. MYERS.

PLEADING.—Written Instrument.—In a suit on a promissory note executed by the defendant to the husband of the plaintiff, the complaint alleged that said husband died testate; that by his will he gave to the plaintiff all his estate after the payment of the debts; that the estate had been finally settled by the executor, leaving said note as a part of the property bequeathed to her.

Nelson v. Myers.

Held, that the complaint was not insufficient because said will or a copy thereof was not filed with it.

APPEAL from the Madison Common Pleas.

DOWNEY, J.—This was an action by the appellee against the appellant on two promissory notes, made by the appellant, payable to the husband of the appellee.

There is a paragraph in the complaint on each of the notes, and it is alleged that her husband died testate; that by his will he gave her all his estate after the payment of the debts; that the estate had been finally settled by the executor, leaving, as a part of the property bequeathed to her, the notes in said suit.

The record recited that it was shown to the satisfaction of the court, by the return of the sheriff, that the process issued in the case had been duly served on the defendant more than ten days before the first day of the term of the court, but neither the process nor return was made part of the record. There was judgment against the defendant by default. Without any steps in the common pleas to have the default set aside, the defendant appeals to this court.

Two questions are raised and discussed under the assignment of errors: first, that the will, or a copy of it, should have been filed with the complaint; second, that the court erred in rendering judgment without notice to the defendant.

On the first point, our opinion is that the plaintiff need not to have filed the will or a copy of it. The action was upon the notes, and not upon the will. It is the written instrument, or a copy of it, on which the action is brought, that must be filed with the complaint. 2 G. & H. 104, sec. 78.

With reference to the other point, a *certiorari* awarded by us brings up the summons and return, showing the issuing and service of process in time.

The judgment affirmed, with ten per cent. damages and costs.

W. R. Pierse and *H. D. Thompson*, for appellant.

C. D. Thompson, for appellee.

Fouty v. Fouty and Another.

FOUTY v. FOUTY and Another.

VOLUNTARY CONVEYANCE.—Trust.—A voluntary conveyance of land, without any consideration, either good or valuable, is valid and binding between the parties thereto and their privies; and parol evidence cannot be given by or between them that the deed of conveyance, absolute on its face, was made upon the agreement of the grantee to hold the land in trust and reconvey it to the grantor or to the grantor's son at a future time upon the happening of a contingency.

FRAUD.—Promise.—A representation upon which fraud can be predicated must be of an existing fact, or of a fact alleged to exist, and cannot consist of a mere promise.

84	438
134	120
34	433
139	408
34	433
145	203
34	438
152	174

APPEAL from the Hancock Circuit Court.

PETIT, C. J.—The complaint is this: The plaintiff says: that Amos Fouty, heretofore, to wit, on the 12th day of August, 1861, and for a long time previous, was the owner in fee simple of the following tract of land in said county of Hancock: the east half of the north-east quarter of section twenty, township fifteen, north of range seven east; that said Amos was at the time aged, feeble in health and mind, having a chronic and incurable disease; that he had a wife, Jane, who was also aged, that said Amos and Jane had no children or descendants of children, except the plaintiff, who was their son; that the defendant is an uncle, brother of said Amos; in whom he placed great confidence; that said Amos, being in the above condition of body and mind, the defendant, with the fraudulent intent, to deprive said Amos of said land, represented to him that if he would convey said land to him, defendant, by deed in fee, he, defendant, would hold the same in trust for said Amos and Jane, and on their death for plaintiff, and would reconvey the same to said Amos at any time on request, or in case of his death, to said plaintiff; that, trusting to said representations, the said Amos and Jane, upon said day, without any consideration whatever, either good or valuable, executed to the defendant an unconditional warranty deed (a copy of which is filed herewith); that said deed recited the consider-

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ation of twenty-six hundred dollars, but the same was executed, as above stated, without any consideration whatever; that said Amos, with his said wife, Jane, were living upon said land at the time of the execution of said deed, and had been for a long time previous; that they continued to reside there, and enjoy and manage the same, and receive the rents and profits, with the knowledge and consent of the defendant, without his let or hinderance, until their deaths, to wit, of said Amos, on the — day of ———, 1864, and of said Jane, on the — day of ———, 1863, to wit, at said county, without any heir of either except the plaintiff; that said plaintiff, on the — day of ———, 1862, volunteered as a soldier in the army of the United States, and remained in the service until after the death of his said parents, to wit, the — day of ———, 1865, when he was honorably discharged at the expiration of his service; that immediately on his return, and before the commencement of this action, he applied to the defendant, and requested of him a reconveyance of said land to him, which he refused and still refuses; that he holds said land fraudulently, without right, and without any consideration whatsoever; that said Amos and Jane each died intestate, without any indebtedness whatever, excepting one hundred dollars; that each left sufficient personal property in said county, now remaining there, to pay all the indebtedness of each, and at least three hundred dollars over and above all such indebtedness, if any there be; that no letters of administration have been taken out in said county, or elsewhere, upon the estate of either said Amos or Jane; wherefore he prays that said conveyance to said defendant be set aside, and that he reconvey said land to the plaintiff, and other proper relief.

To this complaint the defendants demurred, for the reason that it does not state facts sufficient to constitute a cause of action against them; which demurrer was overruled, and this ruling was excepted to; and this presents for our consideration the question of the legal sufficiency of the complaint.

A voluntary conveyance of land without any consideration,

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either good or valuable, is valid and binding between the parties and their privies; nor can parol evidence be given, by or between them, that such deed of conveyance, absolute on its face, was made in trust to the grantee, and that he was to reconvey at a future time on the happening of any contingency. *Jackson v. Garnsey*, 16 Johns. 188; *Richter v. Irwin*, 28 Ind. 26; *Thompson v. Elliott*, *id.* 55; *Matlock's Adm'r v. Nave*, *id.* 35; *Osborne v. Moss*, 7 Johns. 161; *Jackson v. King*, 4 Cow. 207; *Seward v. Jackson*, 8 Cow. 406; *Boyd v. Stone*, 11 Mass. 342; *M'Neely v. Rucker*, 6 Blackf. 391; *Doe v. Hurd*, 7 Blackf. 510; *Rockhill v. Spraggs*, 9 Ind. 30; *Squire v. Harder*, 1 Page, 494; *Philbrook v. Delano*, 29 Me. 410; *Movan v. Hays*, 1 Johns. Ch. 339; *Barnard v. Flinn*, 8 Ind. 204; *Springer v. Drosch*, 32 Ind. 486; *Fairchild v. Rasdall*, 9 Wis. 379; *McCaw v. Burk*, 31 Ind. 56.

But it is held and urged by the appellee that fraud is charged in the complaint, against the appellant, and that fraud vitiates all contracts, and hence it can be proved and this deed set aside and held for naught. The only thing charged as or for fraud is as follows: "That the defendant, with the fraudulent intent to deprive said Amos of said land, represented to him that if he would convey said land to him (defendant) by deed in fee simple, he, the defendant, would hold the same in trust for said Amos and Jane, and would reconvey the same to said Amos at any time on request, or in case of his death to said plaintiff; that trusting to said representations, the said Amos and Jane upon said day, without any consideration whatever, either good or valuable, executed to the defendant an unconditional warranty deed." This is not such a fraudulent representation as will avoid a deed. Representations upon which fraud can be predicated must be of an existing fact, or of a fact alleged to exist, and not a mere promise to do something afterwards.

In *Richter v. Irwin*, 28 Ind. 26, the plaintiffs below had averred, "that to induce the purchase of certain lands, the defendant fraudulently represented to the plaintiffs, that he would grant to the plaintiffs an easement upon his lands by

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the location of a street," &c. This court held, that "the fraudulent representation relied on was not a false statement as to an existing fact, but merely a promise by the defendant that at a future day he would grant to the plaintiffs and the public an easement upon his land, which would, by the particular location of the street, be of private advantage to the plaintiffs by increasing the value of their property, to which the easement would be annexed. This easement is an interest in the lands, and the promise, having been oral, is not binding under the statute of frauds." *Smith v. Richards*, 13 Pet. 26; *Jackson v. Garnsey*, *supra*; *Foley v. Cowgill*, 5 Blackf. 18. These cases are decisive of this question of fraudulent representations.

There is no cause of action shown in the complaint, and the demurrer should have been sustained to it; and for this error the judgment is reversed, at the costs of the appellee.

B. F. Davis and *B. F. Love*, for appellant.

M. M. Ray, *J. W. Gordon*, *W. March*, and *J. L. Mason*, for appellees.

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INDICTMENT.—*Liquor Law*.—In an indictment for selling intoxicating liquor without a license, if the selling be charged as of a less quantity than a quart at a time, it is not necessary that it should also be charged that the liquor sold was to be drank in the defendant's house, out-house, yard, garden, or the appurtenances thereto belonging. *Compher v. The State*, 18 Ind. 447, explained.

SAME.—*Time*.—Under the code, as at common law, an indictment must charge the offense to have been committed on a particular day stated.

SAME.—An indictment charged the offense to have been committed "on or about the — day of July, 1869, which was the first day of the week, commonly called Sunday."

Held, that the indictment should have been quashed on motion, for failure to designate the time of the commission of the offense.

APPEAL from the Decatur Circuit Court.

WORDEN, J.—Indictment of the appellant for retailing without license. Motion to quash overruled. . Trial by the court; conviction and judgment; exceptions.

The indictment charges that the defendant, without license, on or about the —— day of July, 1869, which was the first day of the week, commonly called Sunday, at, &c.. sold to one Ira Wood, intoxicating liquor, by a less quantity than a quart at a time, for the sum of ten cents.

It is insisted that the indictment should have been quashed, for the reason that it does not charge that the liquor was to be drunk in the defendant's house, &c.; and the case of *Compher v. The State*, 18 Ind. 447, is cited in support of the position. The tenth section of the temperance law, 1 G. & H. 616, defines two offenses and prescribes the punishment therefor, first, the selling or bartering, by an unlicensed person, of intoxicating liquors by a less quantity than a quart at a time; second, the selling or bartering, by an unlicensed person, of any intoxicating liquors to be drunk or suffered to be drunk in his house, out-house, yard, garden, or the appurtenances thereto belonging. Thus it is lawful to sell, without license, intoxicating liquors in quantities of a quart or more at a time; yet it is unlawful to sell, without license, such liquors in any quantity, to be drunk or suffered to be drunk in the places named in the statute. In the case of *Compher v. The State*, the indictment was for selling a *quart*, and no offense was committed unless the liquor was to be drunk or suffered to be drunk at some one of the interdicted places.

The indictment in the case before us is for selling by a less quantity than a quart, and charges a violation of the first branch of the section, which makes it unlawful to sell in such quantity, without reference to the place where it is to be drunk.

An objection is made, however, that is fatal to the indictment; which is that it fails to allege the time of the commission of the offense. It will be seen that the closest ap-

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proximation given to the time of the offense is some Sunday in July, 1869..

It is a thoroughly established principle of criminal pleading that the crime must be charged to have been committed on a particular day, to be stated in the indictment. *Hampton v. The State*, 8 Ind. 336.

We have the following statutory provision on the subject: "The precise time of the commission of an offense need not be stated in the indictment or information; but it is sufficient if shown to have been within the statute of limitations, except where time is an indispensable ingredient of the offense." 2 G. & H. 402, sec. 56.

This statute does not dispense with the necessity of stating a day on which the offense was committed; but it is declaratory of what was the law before, viz.: that the State is not bound by the day stated, but may prove any other day within the statute of limitations in all cases where time is not an ingredient of the offense. The effect of the statute is the same as if it read as follows: "The real time of the commission of an offense need not be stated in the indictment; but it is sufficient if shown *by the proof* to have been within the statute of limitations, except," &c.

This is the construction given the statute in the case of *Hampton v. The State*, *supra*, where the court, after citing the statute, say: "This does not change the common law rule as above stated. It does not dispense with the stating of time, but it need not be the precise time proved."

In that case it was held that an indictment was good that charged the commission of an offense "on or about" a stated day, rejecting as surplusage the words "or about."

It may, perhaps, be regarded as somewhat technical to hold that time must be stated in the indictment, while in the proof the prosecutor is not bound by the time stated; but it is our duty, not to make the law, but to declare and administer it as we find it. We quote, as pertinent to the case, an extract from the opinion of the court as delivered by Judge STUART, in the case of *Rosenbaum v. The State*, 4

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Ind. 599. "There is nothing in the revision that we are aware of, and surely no consideration of sound policy, which should induce the court to relax the strictness required in all the substantials of criminal pleading and evidence. Any other rule would be pernicious in its tendency. The harmless decision of to-day becomes the dangerous precedent of to-morrow. The people have no better security than in holding the officers of the State to a reasonable degree of care, precision and certainty in prosecuting the citizen for a violation of the law."

The judgment below is reversed, and the cause remanded, with instructions to quash the indictment.

C. & F. K. Ewing, for appellant.

B. W. Hanna, Attorney General, and *A. B. Campbell*, for the State.

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APPEAL from the Decatur Circuit Court.

WORDEN, J.—This was an indictment for retailing without license. The judgment must be reversed, for the reason stated in another case between the same parties decided at the present term, *ante*, p. 436, the indictment being defective in the same particular.

The judgment is reversed, and the cause remanded, with instructions to quash the indictment

C. & F. K. Ewing, for appellant.

B. W. Hanna, Attorney General, and *A. B. Campbell*, for the State.

Wilson v. Vance, Administrator.

WILSON v. VANCE, Administrator.

SUPREME COURT.—Evidence.—Amount of Recovery.—The Supreme Court will not interfere with the action of the court below upon the question of the amount of recovery, where such amount depends upon a calculation, the data for which, in the evidence, are uncertain and unreliable.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—The complaint in this case states that Wilson and the deceased were partners in business, and engaged in constructing a railroad from Lawrenceburgh to Indianapolis; that there had been no settlement of the business of the partnership; and that the plaintiff believes and charges, that the decedent was, at the time of his death, and the said administrator is, indebted to him in the sum of eight thousand dollars, as balance due upon general partnership accounts; that of this sum, one-half of four thousand dollars, to wit, two thousand dollars, arises from an excess of ten per cent. upon forty one-thousand-dollar bonds, taken by the decedent and not accounted for, upon which the defendant is indebted to the late firm in the sum of four thousand dollars, and interest thereon for nine years, the one-half of which is due to the plaintiff on settlement. He demands a settlement of the accounts and judgment for the sum of (eight) twenty-five thousand dollars.

The plaintiff, having been required to file a bill of particulars, discharged the rule by putting on file an account covering thirty-five pages of legal cap.

A demurrer to the complaint because it did not state facts sufficient to constitute a cause of action was overruled, and the defendant answered, first, that the action did not accrue within six years before the decease of Vance; second, a general denial of the complaint; third, as to so much of the plaintiff's claim as alleges payments made to divers persons mentioned in the bill of particulars, that they were made out of the funds of Vance and Wilson, and that Vance handed the money to Wilson with which to make the payments;

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fourth, that by the terms of the partnership, Vance alone was to pay all debts out of money of the firm, and did so pay, and if plaintiff made any payments it was done voluntarily and of his own wrong, &c.; fifth, that the road was finished in 1853, and all the business completed, and that in 1854 all the business of the firm was fully settled, &c.

Reply, first, a general denial of the answer; second, a denial of the third paragraph of the answer; third, to the fourth paragraph of the answer, that the debts therein mentioned were not paid out of the money of the firm, but out of the money of the plaintiff; fourth, denial of fifth paragraph of the answer. The plaintiff afterwards filed a fifth paragraph of reply, addressed to the first paragraph of the answer, asserting that the cause of action, or portions of it, accrued within six years before the death of Vance, and also explaining a writing which had been signed by the plaintiff at the request of the attorney of the defendant, which it seemed he apprehended would be used in evidence to show that the cause of action was barred by the statute of limitations.

Thereupon, the record says, the plaintiff *dismissed* the first paragraph of his reply, the defendant filed a demurrer to the fifth paragraph, and with the issues thus incomplete there was, by agreement of the parties, a trial by the court, and a finding for the plaintiff for \$3,082.41.

The plaintiff, not being satisfied with this result, moved the court to grant a new trial, but the court overruled his motion and rendered judgment in his favor for the amount of the finding.

It is assigned for error that the court erred in refusing to grant the new trial.

The written motion for a new trial assigned the following reasons: first, the judgment is less by several thousand dollars than the evidence would require, to wit, eight thousand dollars; second, the court, in the finding, overestimated the cost of the work and materials by an amount of over forty thousand dollars; third, the court, in the finding, omitted a large amount of interest received by the intestate upon the

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bonds, to wit, \$5,670; fourth, the court omitted in account \$26,580 of stock taken upon subscriptions, and seventy dollars cash dividends taken upon the same; fifth, the court omitted an item of about \$5,670 of interest upon bonds which Vance did not account for; sixth, the court omitted to charge twenty one-thousand-dollars bonds, received by Vance and not accounted for.

An affidavit was filed with these reasons for new trial, but as it is not in the bill of exceptions, but copied in the record without authority, we cannot consider it.

The first reason assigned why the court should have granted a new trial is within the fifth statutory cause for granting a new trial, that is, "error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property." 2 G. & H. 211, sec. 352. The other reasons can only be regarded as specifications under the first.

Looking at the reasons assigned for granting a new trial alone, we might well infer that the common pleas had committed an error in refusing to grant the new trial.

In the second reason assigned there was an error of \$40,000; in the third, an error of \$5,670; in the fourth, \$26,580, and in another item, \$70; in the sixth, \$20,000, saying nothing about the amount mentioned in the fifth, which is probably a repetition of the third. All these amounts together make \$92,320. The one-half of which, as we infer, was the amount of the mistakes made against the plaintiff, which would be \$46,160. If we add to this the amount of his recovery, which was \$3,082.41, we have \$49,242.41, the amount which it must be inferred the plaintiff believes he ought to have recovered. But when we look at the original complaint, and there find that the plaintiff, in stating his case, claimed only that the administrator was indebted to him in the sum of eight thousand dollars, his reasons for being dissatisfied with the judgment of the common pleas seem not to be so well founded.

Wilson had sued another party for this same claim, in sub-

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stance, and in that suit had taken the deposition of Vance to be used in his behalf. This deposition of Vance was used in this case as evidence against his administrator. It is quite evident that it was not made with any view on his part to a controversy between him and Wilson; nor did he, as appears from the face of the deposition, state fully the matters relating to the former suit. While this deposition, in the other case, is admissible as evidence against his administrator, in this case, its weight or force as evidence was a question for the common pleas. And the same is true with reference to the other evidence in the case. The judge, who sat as a jury, passed upon the evidence as a tier of the facts, and then again on the motion for a new trial. In this deposition Vance states that he and Wilson made no profits in constructing the road, nor any pay for their services, but, on the contrary, came out in debt.

A part of the books kept by Vance, relating to the business, were in evidence, but other books were not to be found. The books given in evidence were incomplete.

Calculations are made by the counsel of each party in the printed briefs, to show that his theory of the case is a correct one; and finally there is a calculation in manuscript by the plaintiff himself, which we are assured is "fair and impartial."

The difficulty in the case is that the data upon which the calculations are made are uncertain and unreliable. Mere inferences are taken for facts on which to commence, and hence the results are different. If the items on each side of the account were established, a little skill in mathematics would serve to find the correct result. But this is not the case.

Unless we should depart from the well established rule of this court in passing upon the facts of the case, there is no reason for our interference with the judgment of the common pleas.

The judgment is affirmed, with costs to the appellee.

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Hendricks, Hord & Hendricks, Barbour & Jacobs, C. A. Ray, J. Buchanan, and A. Wilson, for appellant
J. L. Ketcham and J. L. Mitchell, appellee.

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34	444
147	685

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STATUTE OF FRAUDS.—*Abandonment of Lien.*—Where a creditor having a right to a lien on property for the payment of his claim abandons such lien to a person having an interest in such property, upon the verbal promise of the latter to pay such debt, not his own, such a promise is not within the statute of frauds, and may be enforced against the person making it.

PARTIES.—*Defendants.*—Suit to enforce such a promise for the payment of an amount to be ascertained by settlement of accounts, it not appearing that such settlement had been made.

Held, that the original debtor was a necessary party defendant.

APPEAL from the Madison Common Pleas.

BUSKIRK, J.—The material facts stated in the complaint are these: Elijah J. Walden and Nichols and King were the owners of a lot in the city of Anderson, in the county of Madison, and State of Indiana; that they made and entered into a contract with Joseph Luark to erect for them on the said lot two business houses; that afterwards Luark employed the plaintiffs to put up the brick walls of said houses, at so much per thousand; that after a part of the work had been done under that contract it was so changed that the plaintiffs were to be paid by the day; that the plaintiffs put up the said walls, for which Luark was indebted in the sum of about eight hundred dollars; that at the time when plaintiffs had completed their part of the said building, the said Walden was indebted to the said Luark in the sum of five hundred dollars on the said contract for building the said houses; that they were in the act of filing a mechanic's lien on the said house for the amount so due to them from the

said Luark; and the said Walden, being informed thereof, requested them not to file such lien, and then and there informed them that he was indebted to Luark on the said building contract in a sum greater than Luark owed them; that it was then agreed by the said Walden that he would pay the plaintiffs the sum which the said Luark owed them, and that he would retain the amount in his settlement with Luark, on the condition that the plaintiffs would not file a mechanic's lien on the said building; that the plaintiffs, relying upon a promise of the said Walden, did not file a lien on the said building, and that the time had passed by when the said lien could be filed; that neither the said Luark nor the said Walden had paid him the said sum of money, for which sum they demanded judgment against Luark and Walden, and for other proper relief.

The appellants demurred separately to the complaint, and assigned for causes, that the complaint did not state facts sufficient to constitute a cause of action; and that there was a misjoinder of causes of action, for the reason that if the defendants were liable at all, it was a separate, and not a joint liability. The demurrer was overruled, and the appellants excepted to such ruling, and this is assigned for error.

It is insisted, in argument, by the attorney of Walden, that his agreement to pay the plaintiffs the amount due them from Luark did not create a legal liability against him, for the reason that it was a parol agreement to pay the debt of a third party. We are aware that there is great conflict in the authorities on this question, but the very decided weight of the recent decisions is, that where a person has a lien on property for the payment of his debt, and he abandons such lien to a person who has an interest in such property, upon the promise of such person to pay his debt, the promise is not within the statute of frauds, and the person making the promise is liable therefor. *Spooner v. Dunn*, 7 Ind. 81; *Throop Validity Verbal Agreements*, 564 ch. 16; *Browne Stat. of Frauds*, 201-5; *Roberts Stat. of Frauds*, 128, \approx 63.

We are quite clear that the case under consideration comes

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within the rule and principle enunciated in the above authorities. The plaintiffs had a lien under the statutes of this State upon the house, for the amount due them on their work, from Luark, who also had a lien on such house for the sum due him from Walden. Walden was indebted to Luark, and to prevent a lien from being placed on his property, he agreed to pay the plaintiffs, and they, in reliance upon his promise, abandoned their lien, which was a substantial right and a sure and effectual remedy; and it would be a fraud upon them to permit Walden to avoid his promise because it was not in writing.

This court, in the case of *Spooner v. Dunn*, *supra*, say, "There is a distinct class of cases which clearly establish the rule, that where a specific lien or substantial benefit is surrendered, upon the express promise of a third person to pay a debt, it is an original undertaking and not within the statute." The correctness of the above decision has been very gravely questioned by high authority, and we are strongly inclined to hold that the doctrine was carried too far. It is stated too broadly. There should have been some qualifications or restrictions imposed. It ignores the fact that the person making the promise had any interest in the property on which the lien existed, and that he was benefitted by the abandonment of the lien. The modern and recognized doctrine on this subject is stated thus by SHAW, C. J., in the case of *Nelson v. Boynton*, 3 Met. 396: "The rule to be derived from the decisions seems to be this: that cases are not considered as coming within the statute, when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute."

The case under consideration comes within the rule laid down in the above case. The appellees had the right to place a lien on the property of Walden. In consideration of their abandonment of this right, he made the promise. This

abandonment conferred on him a benefit which he had not previously enjoyed, and it was the immediate result of his promise. It was his property, and not that of Luark, that was released from the lien.

It is also insisted, that the court erred in overruling the demurrer to the complaint, for the reason that there was a misjoinder of causes of action. Sec. 52 of our code, 2 G. & H. 81, provides, "No judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action." •

Walden filed an answer in denial. Luark filed an answer in four paragraphs. The first was the general denial; the second was payment; the third was a recoupment of damages occasioned by failure of plaintiffs to erect the walls of the house in the time and manner provided by the contract; the fourth alleged that when the action was commenced, he was a resident citizen and householder of Hamilton county, in the State of Indiana, and then was, and that as he was not jointly liable with Walden, the court had no jurisdiction of him. This paragraph was sworn to. There was a reply in denial. There was a trial by the court, by the agreement of the parties, and a finding for the plaintiffs. A motion for a new trial was made, overruled, and an exception taken. The evidence is in the record, and fully sustains the finding of the court on the pleas in bar. We have had some difficulty in determining whether Luark was a necessary party, but we have reached the conclusion that he was, and that the Madison Common Pleas Court acquired jurisdiction of his person. The agreement of Walden was to pay the plaintiffs the amount that Luark owed them for work on the building. The amount was not then definitely determined. It had to be ascertained by a settlement. The record does not disclose the fact that there ever was a settlement. It was therefore necessary to make Luark a party, so that the amount due from him to the plaintiffs might be ascertained, and thus fix the liability of Walden on his undertaking to pay whatever was due.

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Section twenty-two of the code provides, that "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had, without the presence of other parties, the court must cause them to be joined as proper parties," &c.

We think that the presence of Luark as a party was necessary to a complete determination of the matters in controversy in this action. If this action had been commenced against Walden alone, the court would have caused him to be made a party, and in such a case it was proper for the plaintiffs to make him a defendant. The extent of the liability of Walden depended upon the amount that Luark owed the plaintiffs, and this could not be determined by the court without Luark was a party.

We are clearly of the opinion that the court committed no error.

The judgment is affirmed, with costs.

J. W. Sansberry, and *E. B. Goodykoontz*, for appellants.

W. R. Pierse and *H. D. Thompson*, for appellees.

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NEW ERA.

WATER CRAFTS.—*State Courts.*—*Jurisdiction.*—*Admiralty.*—Our State courts have jurisdiction of an action *in rem* to enforce a lien, under the statute, against a steamboat built in a port of this State, for the price of her engines and boilers furnished to her at said port,—this not being a proceeding in admiralty.

APPEAL from the Floyd Circuit Court.

DOWNEY, J.—This was a proceeding by attachment to

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enforce a lien, under the statute of the State, against a steamboat, for the price of the engines and boilers. The boat was built at New Albany, in this State, and the engines and boilers were there furnished and put in the boat. The machinery named was made and furnished under a written contract which is set out in the complaint. After its delivery a note for one-half of the price was executed by the master, for the boat and owners, at four months, which is also set out in the complaint. This note was indorsed by the payees to the plaintiffs, and, in connection with the other matters alleged, constitutes their cause of action. The contract for the engines and boilers is dated the 25th day of June, 1860, and the note bears date the 19th day of November, 1860.

The sheriff, by virtue of the attachment, seized the boat, her machinery, tackle, furniture, and other appendages. The boat had changed her name between the time of furnishing the machinery and the time of her seizure, and hence the use of an *alias* in her designation. It does not appear that her ownership had changed.

There was a motion to quash the attachment, for the reasons, first, the court has no jurisdiction of said cause; second, because the writ of attachment was improvidently issued, no sufficient affidavit being on file; third, because the affidavit on which the attachment issued is irregular and insufficient in substance and form; fourth, because the affidavit does not state facts sufficient to authorize the issuing of the writ. This motion was sustained by the circuit court, the writ quashed, and final judgment rendered for the defendant. The question is reserved by bill of exceptions.

In the case of *Ballard v. Wiltshire*, 28 Ind. 341, this court seems unnecessarily to have conceded a general want of jurisdiction in the State courts in cases provided for by the State law. The case proceeded upon the supposition that the Supreme Court of the United States had held that the jurisdiction of the district courts of the United States extended to cases where the maritime law gave no lien, as well

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as to cases where it did; in other words, that our statute gave the lien in no cases except in those which were admiralty cases, properly so called, and that therefore the case of *The Hine v. Trevor*, referred to in the opinion in that case, had swept away the whole course of state legislation and judicial decision on the subject.

The case of *The Hine v. Trevor*, 4 Wall. 555, was a case based upon a marine tort. It was a case where the boat was seized, under the laws of the State of Iowa, for injuries resulting from a collision with another boat, and was therefore a clear case of admiralty jurisdiction.

So the case in this court of *Ballard v. Wiltshire*, *supra*, was clearly a case of that kind, for though the fact does not appear in the opinion, an examination of the files shows that it was based on the violation of a contract of affreightment, which is the subject of admiralty jurisdiction. 2 Parsons Maritime Law, 565, and authorities cited.

In the case of *Ford v. Fuget*, 29 Ind. 52, which was a suit on the bond given to release the boat, this court seems to have been governed by the same opinion that controlled it in the case in 28 Ind.; but in *Wyatt v. Stuckley*, 29 Ind. 279, this court held, that as there is no maritime lien for building, fitting out, and constructing a steamboat, the statute of the State giving such a lien, and authorizing a proceeding *in rem* to enforce it, was not in violation of the constitution of the United States; that it did not follow that because the statute gave a lien and authorized a proceeding *in rem* to enforce it, the suit must be in admiralty.

It cannot be a question with the courts of the United States as to the *form* of remedy which the states shall provide to enforce rights which are given by the states, and to which the jurisdiction of those courts does not extend. So far as the statute of the state attempts to give jurisdiction to the state courts over those maritime contracts and torts which are properly and exclusively cognizable in the federal courts, it must be conceded to be inoperative. But, aside from these, there are rights conferred by the statute of the State, and a

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remedy therefor given, which in no respect trench upon or conflict with such maritime causes of action, or the jurisdiction of the United States courts to enforce them. We think this position is sustained by the decisions of the Supreme Court of the United States as they now stand. *The Belfast*, 7 Wall. 634; *Steamer St. Lawrence*, 1 Black, 522.

At all events, we are satisfied with the position of this court as announced in the case in 29 Ind. 279. Applying the rule there expressed to the case at bar, we must hold that the circuit court had jurisdiction to enforce the lien by attachment under the State law, and so far as this point is concerned, should have overruled the motion to quash the attachment.

We are informed by counsel for appellants, for we are not favored with a brief in behalf of appellee, that other objections were made in the circuit court to the proceeding.

The note says, the "T. W. Roberts and owners promise to pay." The complaint, &c., are against the "R. R. Roberts, *alias* The New Era." The identity of the boat attached with that for which the engines and boilers were furnished is matter of evidence. Perhaps if there was a misnomer, it should have been pleaded in abatement, and might not be made a ground for dismissing the proceeding. There is no question that the present name of the boat is correctly given. This variance, if the right boat has been attached, may, no doubt, be amended.

It was also objected that there was no sufficient averment that the debt was due. There is nothing in this objection. It is alleged that the note was executed at four months, for the debt, and it shows upon its face that fact and that it was due; and the complaint alleges that the amount was demanded of the master of the boat, and that he refused to pay it. This is sufficient on this point.

The other points mentioned and discussed by the appellants will more properly come up on demurrer to the complaint, in the subsequent pleadings, or on the trial of the cause.

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The judgment of the circuit court quashing the attachment and dismissing the cause is reversed, and the cause remanded; costs to the appellants.

M. C. Kerr and *W. J. Hisey*, for appellants.

A. Dowling, for appellee.

34	452
128	830
34	452
144	877

THE STATE, on the Relation of EVANS, Auditor of State, *v.*
MCGINNIS, Auditor of Marion County.

STATE BOARD OF EQUALIZATION.—*Members of, How Chosen.—Addition to Appraisalment.*—To constitute a person, other than the Auditor of State, a legal member of the State board of equalization he must have been selected as a delegate thereto by a district board of equalization, from its own number composed of the auditors of the counties in the district; and a resolution of such State board, of which only a minority of the members have been so selected, providing for an addition to the appraisalment of the real estate of a county, is invalid, and the auditor of such county cannot be required to comply with it.

SAME.—*Length of Session.*—Where the State board of equalization remains in session at one time more than ten days, the acts thereof done after the expiration of such period are void.

APPEAL from the Marion Circuit Court.

WORDEN, J.—This was a proceeding by way of mandate, by the State, upon the relation of the auditor thereof, against the appellee, as the auditor of Marion county, to compel the latter to add to the real estate appraisalment of said county thirty per cent. of such appraisalment, in compliance with a resolution of the State board of equalization adopted at the session of said board which convened on the 1st Monday of July, 1869.

The defendant answered, alleging, amongst other things, the following facts: "That said pretended State board of equalization mentioned in the complaint was not a legal board of equalization for State purposes, and was not com-

The State, *ex rel.* Evans, Auditor of State, *v.* McGinnis, Auditor of Marion Co.

posed of delegates chosen by legal district boards of equalization, in this, to wit: that neither of the district boards of equalization was composed of the auditors of the several counties of said districts, as prescribed by law; that the auditors of the fourth congressional district did not meet at the county seat of Decatur county, as required by law, to choose a delegate to such State board; nor did the auditors of the fifth, sixth, seventh, eighth, ninth, and eleventh congressional districts meet at the places required by law, and choose delegates to said State board of equalization; and he says if there were any legal delegates or members of said State board of equalization present at said meeting, such legal members did not compose a majority of the number of delegates required by law, but a minority thereof, and as such minority they had no power to bind the defendant by any order they might make; wherefore," &c.

To this answer a demurrer was filed, but overruled, and exception taken; and the plaintiff failing and declining to make any reply, but electing to stand on her demurrer, final judgment was rendered against her.

This ruling on the demurrer raises the only question presented by the record, so far as the appellant is concerned:

The ruling, we think, was clearly right. By the provisions of the law, the county auditors of the several congressional districts constitute a district board of equalization; and such district board selects one of its own number as a delegate to the State board, which is constituted of such delegates together with the Auditor of State. 1 G. & H. 320. Now, if the district boards, as is alleged in the pleading and admitted by the demurrer, were not composed of the auditors of the districts, they were not constituted as required by law, and could exercise no functions whatever as a district board of equalization, by way of appointing delegates to the State board, or otherwise.

Again, if only a minority of the State board were legal members, as is alleged in the pleading and admitted by the

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demurrer, they could, of course, do no binding act or exercise any legitimate functions as such board.

The answer in question may, in some particulars, be open to the objection of stating conclusions of law, rather than facts; but, on the whole, we think it states facts sufficient to bar the relief sought, and therefore that the judgment must be affirmed.

The appellee has assigned a cross error, which we are induced to notice for the double reason that it legitimately arises in the record, and that the question may hereafter arise in other counties.

The defendant answered, thirdly, that the pretended State board of equalization mentioned in the complaint met as therein stated, on Monday the 5th day of July, 1869, and continued in session until the 16th day of July, 1869, more than ten days altogether; and on said 16th day of July, 1869, being the 11th day after said 5th day of July, 1869, and the 12th day of their session, said board made the order of reappraisement whereby thirty per cent. was added to the valuation of land and lots in Marion county, Indiana, being the same order and resolution mentioned in the complaint, and therefore that the resolution, &c., was without authority of law and void.

A demurrer was sustained to this paragraph of the answer, and the defendant excepted. Upon this ruling the cross error is assigned.

We are of opinion that the demurrer in question should have been overruled. The statute provides, by way of proviso, "that the delegates forming the State board shall not remain in session, at any time, more than ten days.

We think it quite clear, both on principle and authority, that the time thus limited constitutes the term during which the State board may act, and that when the time has expired their functions are ended, and that any act done by them afterwards is without authority of law and void. It is like the term of a court, the duration of which is fixed by law, in which case the court has no authority after the expiration

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of the time limited. *Morgan v. The State*, 12 Ind. 448; *Same v. Same*, 13 Ind. 215.

The judgment on this paragraph of the answer should have been for the defendant, as well as on the one hereinbefore noticed.

The judgment below is affirmed, with costs.

J. W. Nichol and *L. Jordan*, for appellant.

L. Barbour and *C. P. Jacobs* for appellee.

HAWES and Another v. COOMBS and Another.

ARBITRATION AND AWARD.—*Submission*.—Where the parties to an arbitration have not agreed that the submission shall be made a rule of a designated court, the arbitration cannot be regarded as statutory, but may be valid as a common law arbitration.

PLEADING.—*Matters of Law*.—A paragraph of answer in which the defendant pleads matter of law merely, should be stricken out on motion of the plaintiff.

ARBITRATION BOND.—*Suit on*.—*Presumption*.—In a suit on an arbitration bond for the failure of the defendant to perform his part of the award, it will be presumed, the contrary not appearing, that the award is the result of an adjustment by the arbitrators of all, and not merely a part, of the matters included in the submission.

SAME.—*Pleading*.—Where, in such an action, the part of the award to be done by the plaintiff is not void and incapable of enforcement by the law, or the performance thereof is not by the terms of the award made a condition precedent to that on the part of the defendant, an answer alleging a readiness of the defendant to perform on his part upon compliance with the award on the part of the plaintiff is insufficient, whether the complaint alleges performance on the part of the plaintiff or not.

APPEAL from the Floyd Common Pleas.

DOWNEY, J.—Epaphias Hawes, William C. Coombs, and Andrew P. Jackson were partners in business. A difference arose about the settlement of their accounts. They entered into an agreement, as the writing says, "to arbitrate the difference now existing between us in the following manner,

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consisting of all our partnership business, comprising the manufacture of spirits, lumber, hominy, meal, pork, &c. We further agree to make this arbitration the rule of justice's court," &c. It then proceeds to name the persons who are to act as arbitrators, and to specify how, in some respects, the arbitration is to be conducted. By an *addendum* to this writing they say, "this to be a supplement to our bonds," &c. Contemporaneously with the making of this agreement, April 6th, 1869, they entered into bonds with each other for the performance of the award, the said Nathan Hawes becoming bound with said Epaphias Hawes as security for him on the bond executed by him.

In the condition of the bond it is specified that the award shall be made in spirits, whiskey at one dollar and seventy-five cents per gallon, and peach brandy at three dollars per gallon.

The arbitrators, after having heard the case, awarded to Epaphias Hawes eight hundred dollars in whiskey, at one dollar and fifteen cents per gallon, it being six hundred and ninety-four gallons; that Coombs and Jackson should have two hundred dollars in whiskey, at one dollar and fifteen cents per gallon, being one hundred and seventy-four gallons. They further awarded to Coombs and Jackson four hundred dollars, being one-third of twelve hundred dollars borrowed of a party who is named in the award, to be paid in whiskey at one dollar and seventy-five cents per gallon; to Hawes thirty-five gallons of brandy, at three dollars per gallon, being one hundred and five dollars, and seventy gallons of brandy to Coombs and Jackson at three dollars per gallon, being two hundred and ten dollars; one hundred dollars to Hawes in whiskey at one dollar and seventy-five cents, and two hundred dollars to Coombs and Jackson in whiskey at the same price, being one hundred and fourteen gallons. Coombs and Jackson to pay two-thirds and Hawes one-third of the costs. A copy of the award was duly served by the arbitrators on each party.

The action was brought by Coombs and Jackson against

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Epaphias and Nathan Hawes, predicated on the bond, but setting out the written agreement also, which was executed by the parties, except Nathan Hawes, at the same time that the bond was executed.

The plaintiffs allege the performance of the award on their part, and that Epaphias Hawes did not abide by and perform the conditions of said award on his part to be performed, in this, to wit, that he has upon demand reasonably made by the plaintiffs failed and refused to deliver to them one hundred and seventy-four gallons of whiskey, at one dollar and fifteen cents per gallon, of the value of two hundred dollars, and two hundred and twenty-eight gallons of whiskey at one dollar and seventy-five cents per gallon, of the value of four hundred dollars, and seventy gallons of brandy at three dollars per gallon, of the value of two hundred and ten dollars; all of which, it is alleged, he has in his possession, and which should be delivered by him to the plaintiffs under said award, all of which remains due and wholly unpaid, to their damage one thousand dollars, wherefore, &c.

The first defensive movement made by the defendants was an application to the court to compel the plaintiffs to separate and divide their complaint into paragraphs, in such manner as that each paragraph might state but one cause of action, in plain and concise language, &c.

This motion the court overruled, and the defendants excepted. Conceding that the plaintiffs might have sued Epaphias Hawes alone on the agreement, we think it does not follow that they might not sue him and his security on the bond by which they obligated themselves for the performance of the award. The instruments, being executed at the same time, and relating to the same matter, are really only one contract. It was probably unnecessary to make the agreement, as the bond might have been sufficient of itself; and so it may have been unnecessary to set out the agreement in suing on the bond. But we think there was no good reason for sustaining the motion, and that the court did right in overruling it.

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The defendants then demurred separately to the complaint, for the reason that it did not state facts sufficient to constitute a cause of action.

These demurrers were overruled, and this constitutes the second alleged error.

It is clear that the submission and award cannot be sustained as being in accordance with the statute on the subject of arbitrations. The submission was not made a rule of any "designated" court, and the award was not attested as required by the statute. 2 G. & H. 343, sec. 3, and 344 sec. 9.

But we think it may be sustained as a common law arbitration. The criterion by which to distinguish the one from the other, as recognized in the rulings of this court heretofore made, depends on the fact whether the parties have or have not agreed to make the submission a rule of some designated court. *Estep v. Larsh*, 16 Ind. 82, and cases there cited. Also, *Hedricks v. Judy*, 23 Ind. 548; *Titus v. Scantling*, 4 Blackf. 89; *Coffin v. Woody*, 5 Blackf. 423.

The defendants answered the complaint in three paragraphs; first, admitting the execution of the agreement and the bond and the making of the award, they say that the arbitrators so imperfectly executed their powers that a mutual, final, and definite award was not made; that the paper purporting to be such is void for uncertainty, and does not give the plaintiffs any claim or cause of action against the defendants.

This paragraph was stricken out on motion of the plaintiffs, and we think correctly. It pleaded matter of law, and not facts. The legal questions had been raised and decided on demurrer. The general denial was in.

For second paragraph, the defendants, after admitting as in the first paragraph, say that the arbitrators found that there was due to the plaintiffs from the copartnership of Coombs, Jackson, & Hawes the sum of one thousand and ten dollars, for which they were awarded, out of the copartnership assets, five hundred and sixteen gallons of whiskey and seventy gallons of brandy; and that there was due the said

Epaphias Hawes from the said copartnership the sum of one thousand and five dollars, for which sum he was awarded out of the copartnership assets seven hundred and fifty-seven gallons of whiskey and thirty-five gallons of brandy; and that at the time of said arbitration said copartnership was possessed of eleven hundred and forty-one and one-half gallons of whiskey and one hundred and ten gallons of brandy, and no more; that of said whiskey said Coombs and Jackson had in their possession at the time of the award two hundred and eighty gallons, and of the brandy ninety-two gallons; and said Epaphias Hawes at the same time had in his possession eight hundred and sixty-one and one-half gallons of said whiskey and eighteen gallons of brandy; and they say that under the said award said Epaphias Hawes was entitled to have and retain seven hundred and fifty-one gallons of whiskey then in his possession, as his own exclusive property, and that said Coombs and Jackson had no claim whatever, under the award, to any of the whiskey then in his possession, except as to the surplus over and above seven hundred and fifty-one gallons, of one hundred and ten and one-half gallons; that under the terms of said award said Epaphias Hawes was entitled to retain the eighteen gallons of brandy then in his possession as his own property, and have of said Coombs and Jackson seventeen gallons of that in their possession; that the said Coombs and Jackson have not delivered or offered to deliver to said Epaphias Hawes said seventeen gallons of brandy so awarded to him and in their possession as aforesaid, or any part of it; and that they cannot force him to comply with the award until they have complied or offered to comply on their part; and that said Epaphias Hawes had been and then was ready and willing to comply with the terms of said award upon a compliance therewith by Coombs and Jackson.

There was a demurrer filed by the plaintiffs to this paragraph and sustained by the court.

If the submission in the case had been made only for the purpose of dividing between the parties the spirits in their

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possession, and the arbitrators could not, in their award, have gone beyond the quantity on hand, there might be some reason for holding this paragraph good. But the submission was to "arbitrate the differences now existing between us in the following manner, consisting of all our partnership business, comprising the manufacture of spirits, lumber, hominy, meal, pork," &c. We must infer that the arbitrators adjusted all the said matters of difference, and that the award was the result of such adjustment. That part of the paragraph alleging a readiness to perform the award on the part of Epaphias Hawes upon a compliance therewith by Coombs and Jackson does not make it good. If he had alleged performance or tender of performance before suit, it might have been good. There are only two cases in which the plaintiff must even suggest performance on his part; the first is, when the part awarded to be done by him is void, and cannot be enforced by the law, and unless he avers performance the defendant may object to the whole award for want of mutuality. The second is, where by the terms of the award performance on the part of the plaintiff is a condition precedent to that on the part of the defendant; for then he must show that he has done everything necessary to entitle him to call on the opposite party. But tender by the plaintiff and refusal by the defendant will be sufficient, unless the thing to be done by the plaintiff can be done without the concurrence of the other. Kyd on Awards, 287.

Besides this, the defendants pleaded for a third paragraph of their answer the general denial, under which the question of performance or offer of performance, by the plaintiffs might be controverted.

There was a trial by the court, without the intervention of a jury, on the issue formed by the general denial, and a finding and judgment for the plaintiffs, over a motion for a new trial.

A question is raised as to the correctness of the ruling of the court in admitting in evidence the agreement, bond, and award, over the objection of the defendants. We are

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unable to see that there was any error in this ruling. Their execution was not denied by the pleadings. They had been held, on demurrer to the complaint, to be a sufficient cause of action, and were properly admitted in evidence.

Upon the question of the sufficiency of the evidence, we cannot reverse the judgment of the court below. The evidence shows that when the defendant Hawes was requested to perform the award, he first said he would not say whether he would or would not, but when the plaintiffs told him that they would send a constable to make the demand of him, he said to the plaintiffs, that it was not necessary to send a constable, as he had determined that he would not abide the award. This occurred after the award was made and served on the parties, and before the suit. It would seem not to have been necessary for the plaintiffs to make any further demand or offer of performance.

If we have not fully met all the questions raised by the assignment of errors, we hope the counsel for the appellants, for not having furnished us their views in a brief, will consent to share the blame with us.

The judgment is affirmed, with five per cent. damages and costs.

G. V. Hawk, R. M. Weir, C. P. Ferguson, and W. W. Tuley, for appellants.

J. H. Stotsenburg and T. M. Brown, for appellees.

ROBBINS and Others *v.* THE SAND CREEK TURNPIKE COMPANY and Others.

84	461
159	78

INJUNCTION.—*Turnpike.—Act of 1867.—Assessment.*—Where assessors appointed under the act of March 11th, 1867, providing for assessments on lands to aid in the construction of roads, omitted in the list returned by them any land within one mile and a half from the proposed road, their entire assessment is void, and an injunction will lie to prevent its collection.

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SAME.—Parties.—Plaintiffs.—The owners in severalty of separate tracts of land which have been separately assessed to aid in the construction of a road, under said act of 1867, who have no joint interest in said lands, may join as plaintiffs in a suit to enjoin the collection of such assessment because of an illegality thereof which renders it alike void as to all said owners.

APPEAL from the Decatur Circuit Court.

WORDEN, J.—This was an action by the appellants against the appellees to restrain the collection of certain assessments made under the act of March 11th, 1867, for plank, &c., road purposes. Demurrer to the complaint sustained, and judgment for defendants; plaintiffs excepted.

There are two questions raised by this record, first, did the complaint state good ground for the injunction? second, could the plaintiffs join in the action?

The complaint sets out the proceedings at length, showing the organization of the company, the appointment of assessors by the board of commissioners, the return of the assessment, the levying of the tax, and that it is about to be collected and will be collected unless the defendants are enjoined. It is alleged, amongst other things, as a reason why the tax should not be collected, that over one thousand acres of land lying within the limits of one mile and a half from the road were omitted entirely in the list returned by the assessors. This, it has been held several times by this court, vitiates the entire assessment, and renders it void. *Turner v. Thorntown, &c., Gravel road Co.*, 33 Ind. 317, and *New Haven and Fort Wayne Turnpike Co. v. Bird*, *id.* 325. We think the complaint stated sufficient ground for the relief prayed.

Could the plaintiffs join in the action? They were severally the owners of separate tracts of land, on which separate assessments were made, and had no joint interest in the lands; but they were alike affected by the assessment. The illegality of the assessment rendered it alike void as to all of them. It is not a case where the assessment as to one is void for one reason, and as to another for another and different reason, or where different objections are made to the

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different assessments. In a case like this we are of opinion that parties may join in a complaint for an injunction.

A late writer on parties says, "Several persons having a common interest arising out of the same transaction or subject of litigation, though their interests be separate, may join in one suit for equitable relief, provided their interests be not adverse or conflicting. Thus, two or more persons having separate and distinct tenements, which are injured or rendered uninhabitable by a common nuisance, or which are rendered less valuable by a private nuisance, which is a common injury to the tenements of both, may join in a suit to restrain such nuisance. So where the waters of a stream are diverted, to the common injury of the mills below, the owners of the mills, though their titles are several, may properly unite in a bill for an injunction. And several judgment creditors, holding different judgments, may unite in filing a creditors' bill to reach the equitable interests and choses in action of the debtor, or to obtain the aid of the court to enforce their liens at law." Barbour on Parties, 348. See, also, *Kipper v. Glancey*, 2 Blackf. 356. In *Powell v. Spaulding*, 3 Iowa, 443, 461-2; the doctrine is laid down to be, that where there is unity in interest, as to the object to be attained by the bill, the parties seeking redress in chancery may join in the same complaint and maintain their action together.

We think the court below erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

B. W. Wilson, E. R. Monfort, J. S. Scobey, C. Ewing, and J. D. Miller, for appellants.

W. Cumback, S. A. Bonner, J. Gavin, and J. D. Miller, for appellees.

Sage and Others v. Brown.

44 464
183 096

SAGE and Others v. BROWN.

CONTRACT.—Where by the terms of a contract between A. and B., the former was to deliver to the latter, on a railroad switch, at a certain place, within a specified time, certain lumber, which B. was to there receive and measure as it should be delivered, and for which he was to pay a stipulated price to A.;

Held, that it was a sufficient defense to a suit by B. against A. to recover money advanced by the former to the latter under the contract, in excess of the price of the lumber delivered, and damages for the failure of A. to deliver a portion of said lumber, that A. was ready and willing to deliver the lumber according to the contract, of which fact he notified B., but that B. notified A. that he need not deliver the lumber at said place, unless he would permit B. to ship it to a certain other place and there to measure and receive it, and that A. had been at all times, and then was, ready and willing to deliver said lumber according to the terms of the contract, but that he had been prevented from so doing by the refusal of B. to measure and receive it according to the contract.

OBJECTION TO EVIDENCE.—*Bill of Exceptions.*—*Motion for New Trial.*—An objection to the admission of evidence cannot be made available in the Supreme Court, where it does not appear by a bill of exceptions that the party objecting stated the ground of his objection to the court below, or where the question has not been presented to the court below as a cause in a motion for a new trial.

INTERROGATORIES TO JURY.—*Answers.*—*Signing by Foreman.*—Answers to special interrogatories propounded to a jury by the court are in the nature of a special verdict and have the same force and effect, and they must be signed by the foreman, the better practice being for him to sign each answer.

SAME.—Either party has the right to demand that such interrogatories shall be fully answered, and that the answers shall be signed by the foreman; and upon such demand being made it is the duty of the court to keep the jury together until the demand be complied with.

VERDICT.—*Sealed Verdict.*—*New Trial.*—Where it was agreed by the parties to an action that the jury should be allowed to seal up their verdict and return it to the clerk of the court, and the jury so returned a general verdict for the defendant and answers to interrogatories, some of the interrogatories not being fully answered, and the answers returned not being signed by the foreman, and the court received the verdict in the absence of the jury and after it had been discharged and the jurors had dispersed;

Held, that these facts constituted good cause for a new trial on the motion of the plaintiff.

APPEAL from the Howard Circuit Court.

BUSKIRK, J.—This is an action commenced in the court below by the appellants, to recover from the appellee a certain amount of money advanced by them to him on a lum-

ber contract, together with damages by them sustained by the breach of such contract.

The complaint alleges, in substance, that the plaintiffs and defendant, on the 28th day of April, 1867, made and entered into a written contract, by which the defendant agreed to deliver to the plaintiffs, on or before the first day of October, 1867, on the switch of the Peru and Indianapolis Railroad, at Kokomo, one hundred thousand feet of sound poplar lumber, and to sell to them all the walnut lumber that he might have to sell during the year 1867; that the plaintiffs agreed to measure and receive such lumber as delivered, and to pay for clear poplar lumber sixteen dollars per thousand, thirteen dollars per thousand for common poplar lumber, and for the walnut lumber the fair, average market price at the time of delivery; that the plaintiffs advanced to the defendant, at the time of making the said contract, the sum of three hundred dollars, and that they afterwards advanced thereon the further sum of two hundred and thirty-five dollars; that the defendant had only delivered seven thousand one hundred and forty-two feet of clear lumber and four thousand eight hundred and thirteen feet of common lumber, which at the contract price amounted to one hundred and seventy-six dollars and sixty-nine cents; that the defendant had failed and refused to deliver any walnut lumber and the residue of the popular lumber; that the plaintiffs had been at all times ready and willing to receive, measure, and pay for such lumber according to the said contract, and to do and perform all the stipulations by them to be done and performed; and that they had sustained damages in the sum of three hundred dollars by the failure of the defendant to deliver such lumber, in addition to the balance due them on the money advanced, for which sums they demanded judgment.

At the April term, 1868, the defendant filed an answer in two paragraphs. The first was the general denial; the second was in confession and avoidance. The plaintiffs demurred to each paragraph; overruled, and ruling excepted.

to. The cause was then continued upon the motion and affidavit of the defendant.

At the November term, 1868, the defendant filed another answer in two paragraphs, in substance the same as the one previously filed. The first was the general denial; the second was in confession and avoidance. In the second, the defendant admitted the making of the contract as set out in the complaint and the payment of the money as therein alleged, but he averred that immediately after the making of the said contract, he commenced cutting, purchasing, and preparing timber for the purpose of filling and discharging the said contract and all the covenants therein contained, to be performed on his part; that on the — day of July, 1867, he delivered to the plaintiffs, at the place of delivery in said contract mentioned, nineteen thousand seven hundred and sixty-two feet of clear lumber and two thousand feet of common lumber, of the quality and value described in the said contract; that he notified the plaintiffs thereof, and requested them to come to Kokomo and measure and receive such lumber; that he was notified and informed by the plaintiffs that he need not deliver any more of such lumber at Kokomo, unless he would permit them to ship the same to Peru, and there to measure and receive it; that he had been ready and willing at all times, and then was ready and willing, to deliver the said lumber according to the terms of the said contract, but was prevented from so doing by the refusal of the plaintiffs to measure and receive the same according to the terms of said contract; and that by reason of such failure on the part of the said plaintiffs he had been damaged in the sum of three hundred dollars, for which he demanded judgment.

We regard the answer last filed as a substitute for the first. To the substituted answer the plaintiffs demurred separately to each paragraph. The demurrer was overruled and excepted to; this is assigned for error. The demurrer was properly and correctly overruled to the general denial. The second paragraph of the answer admits the making of

the contract as alleged in the complaint, and then avers that the defendant was ready and willing to deliver the lumber according to the terms of the contract, but was prevented from doing so by the refusal of the plaintiffs to receive and measure the same at the place of delivery agreed upon by the parties. This paragraph seems to have been treated, in argument, as a plea of performance. As such it would be clearly bad. To make it a good plea of performance, it should have alleged that the defendant had, within the time and at the place of delivery specified in the contract, actually delivered the whole of the lumber. We regard it as a plea showing that the defendant was ready and willing to deliver the lumber, and that the acts of the plaintiffs excused him from making an actual delivery. The appellee had agreed to deliver, and the appellants had agreed to receive, the lumber on the switch at Kokomo. The appellee was not bound to deliver at any other place, and if the appellants notified him that they would not receive it at such place, that would release the appellee from his obligation to deliver at Kokomo, on the principle that the law never requires a foolish or unnecessary thing to be done. There was no error committed by the court in overruling the demurrer to the second paragraph of the answer.

There was a trial by jury; verdict for the defendant, his damages assessed at five dollars; motion and reasons for a new trial filed; motion overruled and excepted to. There was no reply filed, but the objection was not made in the court below nor in this court, and is to be regarded as waived as to the former trial. The court gave the jury, of its own motion, five instructions. The appellants only excepted to the fifth, and the giving of this instruction is assigned for error. The instruction complained of is in these words:

“If you find from the evidence that the defendant was prevented from fulfilling his part of the contract by the plaintiffs, you should find for the defendant; and in this regard you may take into consideration, if you find any evidence

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of the fact, the refusal to receive the lumber unless the seller, the defendant, would ship it to Peru for measurement."

If this instruction stood alone, it might have misled the jury. The omission in this instruction is, that it entirely overlooks the fact that to make a good defense it was necessary to show that the defendant was ready and willing to deliver the lumber, and was either prevented or excused by the conduct of the plaintiffs from performing on his part. The court, in the second instruction, properly charged the law on this subject. The better practice is, to make every instruction full and complete within itself, so that the jury would comprehend and understand the law upon the point without having to refer to other parts of the instructions. Each separate and distinct proposition should be stated in separate instructions. But we are not prepared to say that the instruction in question, when viewed in connection with the other instructions, misled the jury.

The next error complained of is the admission of improper and incompetent evidence. It is insisted, in argument, that certain questions asked of the appellee and answered by him were improper, but the record is not in a condition to make the error, if any was committed, available in this court. The bill of exceptions shows that the appellants objected to certain questions, that the objection was overruled, and they excepted, but it does not appear that the appellants stated the grounds of their objection. Nor did the appellants assign this alleged error as one of the causes for a new trial. The question as to the admissibility of the evidence objected to is not presented by the record. This is too well settled to require a citation of authority.

One of the causes assigned for a new trial was the misconduct of the jury. The court submitted to the jury nine special interrogatories, and directed them if they found a general verdict to answer these interrogatories. It is also assigned for error that the court received the verdict when the jury were not in court, but after the jurors had been discharged and had dispersed. We will consider these two

questions together. The record bearing upon these questions is in these words:

“By agreement of counsel, the jury are allowed to seal up their verdict, and return the same to the clerk of the court; and the jury, having considered of their verdict, return into the hands of the clerk of the court their verdict, which, being published in open court, is as follows, to wit:

“We the jury find for the defendant, and assess his damages at five dollars.

WILLIAM B. SMITH, Foreman

“And the following answers to eight of the special interrogatories.” Then is copied into the record what purports to be the answers of the jury to the special interrogatories submitted to them. The sixth interrogatory is not answered at all, and the seventh and eighth are answered in a very defective and unsatisfactory manner. The answer to each is, “We don’t know.” It was their business to know, or to state that from the evidence in the cause they were unable to answer the questions.

But there is a more serious and fatal objection to what purports to be the answers to the interrogatories than the total failure to answer one and the defective answers to others. The answers are not signed by the foreman of the jury or any other person. A verdict is either general or special. 2 G. & H. 205, sec. 335. Section 334, 2 G. & H. 203, provides, “When the jury have agreed upon their verdict, it must be reduced to writing and signed by the foreman; and when returned into court, the foreman shall deliver the verdict, and either party may poll the jury. If any juror dissent from the verdict, they shall again be sent out to deliberate.” Answers to interrogatories are in the nature and have the same force and effect as a special verdict. Section 336, 2 G. & H. 205, provides, “This special finding is to be recorded with the verdict.” There can be neither a general nor special verdict unless it is signed by the foreman. The better practice certainly is for a jury, in answering special interrogatories, to have the foreman to sign his name under each answer, but it is, beyond

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all question, necessary that he should sign his name to the end of the paper. It was the province of either party to demand that the special verdict should be properly signed, and that the questions should be answered; and upon such demand being made, it was the duty of the court to keep the jury together until the interrogations were fully answered and the answers thereto properly signed by the foreman. *Trout v. West*, 29 Ind. 51, and *Noakes v. Morey*, 30 Ind. 103.

But in this case, this course was rendered impossible by the action of the parties and the court in consenting that the jury might seal up their verdict and deliver it to the clerk, who afterwards published it in court. The agreement does not say in express terms that the jury might separate after they had delivered their verdict to the clerk, but this may be inferred. The jury seemed to have so understood the agreement, for they did separate and were not in court when the verdict was returned. Where the parties consent, it is proper for the court to direct the jury, when they have agreed upon their verdict, reduced it to writing, and had their foreman to sign it, to seal it up and deliver it to their foreman, and then separate until the meeting of the court, and then return their verdict in open court, in the presence of the parties, who can avail themselves of their respective rights. This court, in the case of *Rosser v. McColley*, 9 Ind. 587, after quoting sec. 334, 2 G. & H., 203, say, "This provision evidently contemplates a return of the verdict publicly into court, where the law supposes the parties to be present, and ready to avail themselves of their respective rights to poll the jury. Moreover, to allow the judge, without the assent of the parties, to receive the verdict at his own house, or otherwise out of court, would not, in our opinion, be consistent with a proper administration of justice."

It is not necessary for us to decide in this case, and we do not decide, how far the consent of the parties can dispense with the requirement of the statute that the verdict of the jury should be returned into open court. But it is evident that when the parties, in the case under consideration, con-

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sented that the verdict might be sealed up and delivered to the clerk of the court, it was with the understanding that the general and special verdicts should be reduced to writing and signed by the foreman. This was not done, and, in our judgment, the consent given cannot be regarded as a waiver of the performance of such acts as were necessary to the validity of the verdict. The effect of the agreement was, that when the verdict was reduced to writing and signed by the foreman, it might be delivered to the clerk of the court, and he should open the verdict in court, without the presence of the jury. The jury having been discharged, their functions as such had ceased, and the court had no power to reassemble them. It was the duty of the court to have awarded a *venire de novo*. The court erred in overruling the motion for a new trial, and for this error the cause must be reversed.

The judgment is reversed, with costs, and the cause remanded, with directions to grant a new trial, to complete the issues, and for further proceedings in accordance with this opinion.

L. Walker and *A. Blake*, for appellants.

N. R. Lindsay, *N. P. Richmond*, and *M. Bell*, for appellee.

34	471
120	42
34	471
131	145
34	471
138	694
34	471
151	412

THE MAYOR AND COMMON COUNCIL OF MICHIGAN CITY v. ROBERTS and Another.

MANDATE.—Official Discretion.—City.—Common Council.—Street Improvement.—The courts cannot, upon a proceeding by mandate, review the decision of the common council of a city incorporated under the general law of 1867 for the incorporation of cities, refusing to cause an improvement of a street to be made and paid for out of the general funds in the treasury of the city, and compel the council to cause the improvement to be made and so paid for against their judgment as to its expediency.

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APPEAL from the Laporte Circuit Court.

DOWNEY, J.—The appellees filed their verified petition in the circuit court, stating that the appellee Roberts was the owner in fee simple of lot number eight, block number eight, and the west half of lot number three in said block, in Elston's survey, all fronting and bordering on Washington and Michigan streets, in Michigan City; that the appellee Joseph Oliver was the owner in fee simple of the south-west quarter of lot number seven in said block number eight, fronting on Michigan street, in said city; that in the year 1852, the common council of said city passed ordinances requiring the grading and opening of Washington, Second, and Michigan streets in said city, and for that purpose the property along the line of said improvement was taxed; that in pursuance of such ordinances, the street commissioner caused the improvement to be made, and the property affected thereby was taxed to pay for the same; that the common council has by law the exclusive jurisdiction of streets and alleys, and was bound by law to keep them open for the use and convenience of property owners along said streets, but that said city had failed, neglected, and refused to do so; that said streets are, and for more than one year have been, entirely filled up along the property described as aforesaid, and out of repair, and thence northwardly and westwardly to their termination, so that passage to and from them is impossible; that by reason of the foregoing, their property is of no value to them or to any other person; that they are informed and believe that they have a right to have said streets opened so that they can enjoy their property, and that it is the duty of the city authorities to cause it to be done; that they requested the common council of said city to open and grade said streets, in a paper, a copy of which is filed with the petition, which they refused to do, although they have the means with which it could be done; that they are resident tax payers of the said city; and that the city is organized under the general laws for the incorporation of cities in this State, by which the city is compelled to keep its streets open

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for the use of the public, as well as the property holders along the streets. They annex copies of the ordinances by authority of which the said streets were opened and improved in 1852, and pray for an alternative mandate against the appellants to show cause why a preemptory mandate shall not issue commanding them to cause said streets to be opened, and for general relief. The copies of the ordinances passed in 1852 show that Michigan street was ordered to be improved by cutting eighty feet wide at the base, and the slope to be one foot and a half to one foot of rise, the filling to be the entire width of the street; and that the improvement of Washington street was to be made by cutting forty feet wide at the base and sloping as the other, the filling to be the full width of the street. Persons were appointed in each case to view the real estate to be affected and assess the benefits and also the damages. It is shown by a subsequent order of the council that part of the cost of the improvements was paid out of the general fund, and the residue from the fund arising from the assessments.

The notice, or demand, which it is alleged was served on the city council, a copy of which is filed with the complaint, is addressed to the mayor and council, and requires them to take notice that the persons who sign it are resident tax payers in the city; that they own property on Spring, Washington, Wabash, Second, and Michigan streets, in that city, consisting of various lots on said streets; that theretofore the city authorities had permitted sand to accumulate in said streets to so great an extent that the sand had been precipitated upon the lots owned by them; that their property has been and is comparatively useless; that they have suffered great damage in consequence of the city authorities permitting the sand to accumulate in the streets aforesaid. Concluding, they say, "we hereby demand and request your honorable body to take immediate steps to remove the sand in said streets, without levying a special tax upon the property for that purpose."

Upon this petition an alternative mandate was ordered by

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the court; at the return of which, the appellants appeared and moved the court to quash the writ, which motion was overruled, and an exception was taken.

In the amended and final return of the appellants to the alternative writ, they say that when said parts of said streets were opened as alleged, the city was incorporated under the special charter which had theretofore been granted by the legislature, but the city is now acting under the general law for the incorporation of cities which was passed in 1867, and has no power except such as is derived from said last named act; that said streets were dug and opened through a large and high sand hill situated on adjoining lands and lots in said streets, which then was and still is, at least twenty-five feet in height, and is situated near to and about eight hundred or one thousand feet only from the shore of lake Michigan; that the portions of said streets adjoining and near to said lots are very little used by the public, and if kept open and free from sand would, by reason of their vicinity to the lake and said sand hill, be but little used by, and of little use to, the public; that strong winds often prevail along the lake at that point, by which hills of loose sand are thrown up to a height of from one hundred to one hundred fifty feet, and from the same cause said sand hill through which said streets were dug was accumulated; that said last mentioned sand hill covers several acres of adjoining land and lies near to said larger sand hill before described, and that said land is owned by various individual proprietors; that said sand hill is composed of clear, naked, loose sand which is constantly subject to slide and to be blown about by the winds, and is constantly sliding and being blown into said parts of said streets, and has caused accumulations therein; that such constantly accruing accumulations cannot be prevented otherwise than by the removal of said sand hill, or by erecting along said streets high and expensive barriers against such accumulations, or by building a roof over said streets for their protection against the same; that the use of said parts of said streets is not necessary for others than the owners of

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the lots immediately adjoining the same, and that the benefits of such improvement would inure almost exclusively to them; that such improvements would cost, according to the estimates of the city engineer, and the best judgment of the council, ten thousand dollars; that there are many other streets in the city which are in constant use by the public that require repairs, and that such repairs and the other reasonable and necessary expenses of the city made it necessary during the last year to assess a tax of one per cent., and will constantly require, in the opinion of the council, an assessment of from one-half to one per cent. on all the property in the city; that in 1852, when said improvements were made, two railroads were being constructed and put into operation to the city, and it was then believed by most of the inhabitants that that would add greatly to the value of real estate in the city and cause a large increase of population, but this was a mistake; that real estate soon declined and continued to decline, until it became almost worthless, and so continued until within two or three years past, since which time it has again somewhat advanced in value; that the population of the city does not exceed forty-five hundred, and in the best exercise of their discretion as guardians of the interests of said city they deemed it unwise and inexpedient, and not within the reasonable pecuniary ability of said city at that time to make such improvement; that the assessed value for taxation of all the property in the city was less than one million of dollars; that when said streets were ordered to be opened in 1852, there was only a little sand in them, but by reason of the bushes and other vegetation which formerly grew on said sand hill having been destroyed, the hill is being constantly pressed forward into said streets, and the sand is accumulating there to a great extent, so that the streets cannot, in their judgment, be now permanently opened except by use of the means above mentioned. This return was sworn to by the mayor of the city.

The appellees demurred to the return. Their demurrer was overruled, and they filed a reply, in which they deny

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the allegations of the return, and for further reply say, that in the year 1852, the streets were opened as stated in the petition, and that for sixteen years the appellants had negligently permitted the accumulation of said sand, and made no effort to keep them open, or in a passable condition; that their opening would be of public utility, inasmuch as there is but one street that could be used to get to and from the harbor in that city at that time; that the city then owned fourteen lots on Washington street, which were of no value on account of the obstructions in the streets, but if the streets were opened would be worth ten thousand dollars; that the obstructions are a great damage and detriment to the general interests of the city, and unless removed in a few years, Franklin street, the main business street of the city, will be filled up and rendered useless; that further accumulation can be prevented at a cost of one thousand dollars, if the defendants would take action in the premises; that during the last five years, the citizens, in conjunction with the general government, have commenced the improvement of the harbor at that city, and by the close of that season, a deep, safe, and capacious harbor would be completed, adding largely to the value of the property, &c.; that Washington street leads more directly to the harbor than any other street, and would be more convenient to the harbor than any other street, if worked as in 1852.

Upon this issue there was a trial by the court, a finding for the plaintiffs, that the allegations of the petition were true, and that they were entitled to a preemptory mandate and fifty dollars damages.

A motion for a new trial was made, which was overruled; a bill of exceptions was filed containing the evidence; and judgment was rendered according to the finding.

It is assigned for error, first, that the circuit court erred in overruling the motion of appellants to quash the alternate writ of mandate; second, that the court erred in overruling the motion of appellants for a new trial; third, that the court erred in awarding the preemptory mandate.

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It is not very material whether we consider the case on the motion to quash the writ, or on the motion for a new trial. The question in substance is the same. It is not questioned, nor can there be any doubt as to the jurisdiction and power of the circuit court to award the writ against a municipal corporation such as the appellants. It is expressly provided, that the writ may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins; or a duty resulting from an office, trust, or station. 2 G. & H. 322, sec. 739; *Chapin v. Osborn*, 29 Ind. 99.

It is provided in the act relating to the incorporation of cities, that the common council shall have exclusive power over the streets, highways, alleys, and bridges, within such city, and may prescribe the height and manner of construction of all such bridges, and to lay out, survey, and open new streets and alleys, and straighten, widen, and otherwise alter those already laid out, and to make repairs thereto, and to construct crossings, &c. 3 Stat. Ind. 94, sec. 61.

It is not alleged that the city council were applied to, to order the improvement and have the cost of it assessed against the property benefitted thereby, and that they refused to do so; but, on the contrary, it is shown by the written demand served on them that they were required to make the improvement without levying a special tax upon the property for that purpose. Neither is it alleged that the council refused to take the subject into consideration and decide upon the propriety or impropriety of doing the work. The mayor of the city testified that they had had the question before the council, and had come to the conclusion that it was not judicious to undertake, at that time, the opening of the streets in question.

The point on which the case must turn, as we think, is, could the circuit court, by mandate, review the action of the city council, and compel them to cause the improvement to be made against their judgment as to its expediency?

We have examined the authorities cited by the appellees

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in support of the affirmative of this proposition. Some of them relate to the rights of the adjoining lot owners in the streets. Some have reference to the liability of corporations for injuries resulting to persons or property from the streets being allowed to be out of repair. But none of them come up to the question in hand. The case of *The Borough of Uniontown v. The Commonwealth*, 34 Penn. St. 293, is nearest in point. But it does not appear by what law the officers of the borough were governed, or whether it was peremptory in its requirements, or left the matter in their discretion.

To sustain the proceeding by mandate, the act which it is sought to enforce, in the language of our statute, must be one which the law specially enjoins. Can it be said that the law specially enjoins an act, of the expediency of which the individual, corporation, or tribunal must judge? Municipal corporations possess, to some extent, sovereign powers; and some of those powers are to pass ordinances, some judicial, and some ministerial. *Brinkmeyer v. The City of Evansville*, 29 Ind. 187; *Stackhouse v. The City of Lafayette*, 26 Ind. 17.

In *Wilson v. The Mayor, &c., of New York*, 1 Denio, 595, it is said, on this subject, "The power of the defendants to make sewers and drains is clear, but it not their duty to make every sewer or drain which may be desired by individuals, or which a jury might even find to be necessary and proper. No imperative duty rests upon the defendants to open any new drain whatever. They have a discretion on the subject, and must necessarily decide when and where such work shall be made. If this were not so, this court by writ of mandate might compel the making of new sewers, drains, and vaults, the opening of new streets, and the paving of old ones; and the same power, when applied to the county, would require us to supervise the discretion of commissioners of highways, and in like manner coerce the opening of new roads, and the closing of old ones, not in conformity with the views of the local officers, but as we should judge best calculated to promote the public interests. This is stated by way of illustration; for a mandamus will not lie to control the discretion

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of any tribunal or officer, nor is such tribunal or officer answerable in any form of action, for the manner in which any duty of a judicial or discretionary nature shall have been performed. Granting therefore that a drain should have been made as the plaintiff claims, and even that the defendants wilfully, and in violation of their duty, refused to make one, of which, however, there is not a scintilla of proof, still no action lies for such neglect or violation of duty. As well might commissioners of highways be sued for refusing to lay out a new road on petition, or assessors for placing property at too high a valuation in the assessment roll. In these and innumerable other instances, the officer is to exercise his best judgment and discretion, and although he may be punished, if he act corruptly, he is under no circumstances responsible, civilly, for the execution of the trust reposed in him."

The rule to be gathered from all the cases decided in the Supreme Court of the United States, governing mandamus to the officers of the government, seems to be this: It cannot issue in a case where discretion and judgment are to be exercised by the officer, nor to control him in the manner of conducting the general duties of his office; it can be granted only where the act required to be done is imposed by law, is merely ministerial, and the relator without any other adequate remedy. *Moses Mandamus*, 78.

We are not referred to any decision of this court on this precise point.

We think the question whether an improvement in the streets of a city shall or shall not be made, and paid for out of the general fund in the treasury of the city, is one with reference to which the judgment of the council cannot be reviewed and set aside by the courts on a proceeding by mandate. Whether such a work shall be undertaken or not, is a question depending upon many circumstances, as for instance the state of the treasury; the condition of other thoroughfares, the necessity and utility of the work itself, &c. If the public convenience or private rights require the work to be

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done, and the council improperly refuse to do it, let the citizens place the powers of government in other hands. We think the proceeding cannot be maintained, and that the motion to quash the writ should have been sustained.

Judgment reversed, and cause remanded, with instructions to the circuit court to sustain the motion to quash the writ. Costs to appellants.

J. B. Niles, W. Niles, and M. K. Farrand, for appellants.

J. A. Thornton and J. B. Belford, for appellees.

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APPEAL from the Randolph Circuit Court.

PETTIT, C. J.—Rule eighteenth of this court is as follows: “The assignment of errors shall contain the full names of the parties; and process, when necessary, shall issue accordingly.” In the assignment of errors in this case, the names of the parties set out are, “The I. P. & C. R. Company, appellant, *v.* John Bowers, appellee.” This is not a compliance with the rule above cited, and for that reason must be dismissed. *Brookover v. Forst*, 31 Ind. 255; and *The State, ex rel. Childs, v. Delano* (*ante*, p. 52), decided at this term, and authorities there cited.

The appeal is dismissed, at the costs of the appellant.

J. A. Harrison, for appellant.

T. M. Browne, for appellee.

Smith v. Hazelton and Another.

SMITH v. HAZELTON and Another.

PARTNERSHIP.—*Rights of Partners Between Themselves.*—*Shares of Stock.*—*Settlement upon Dissolution.*—*Pleading.*—A., B., and C. became partners, under an agreement by which they were to contribute equally to the capital stock, which was to be a certain amount. A. and B. contributed their full shares, and C. contributed one-half of his share and was to contribute the other half in one year. The firm purchased real estate, machinery, and materials, and engaged in business. The partnership was dissolved before the expiration of one year by the death of A., and, by consent of all the parties in interest, B. closed up the business, after the expiration of one year from the commencement of the partnership. The partnership liabilities were all paid out of the personal assets of the firm, without resort to said real estate. B., C., and the heir of A. sold said real estate, each separately selling one-third thereof and receiving for himself the consideration of the sale of such interest. In a suit by B. against C. and the administrator of the estate of A., to compel an accounting and settlement of the partnership affairs, and to obtain distribution, C. not having paid in more than his said one-half of his share of the capital stock ;

Held, that the complaint was not bad on demurrer for failing to set forth and account for the purchase-money received by the partners upon their several sales of said real estate, or because the plaintiff did not therein offer to account for the consideration of his sale of one-third of said land.

Held, also, that C. was not entitled to share equally with his copartners in the profits or assets of the partnership without contributing his full share of the capital stock, and that, therefore, in such adjustment the balance of capital stock unpaid by him should be accounted against him.

APPEAL from the Martin Circuit Court.

BUSRIK, J.—This is an action to compel an accounting as between partners after dissolution of the partnership.

The facts alleged are, that on the 15th of February, 1867, the appellant, together with William F. Elston and William F. Hazelton, the appellee, entered into a written agreement of partnership, which stipulated, first, that they had associated to manufacture staves and heading for slack work; second, that the capital stock should be nine thousand dollars; third, that each of the partners should put in, as his share of the joint capital, three thousand dollars; fourth, that Hazelton should pay his share (three thousand dollars).

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in two instalments, the first one, of fifteen hundred dollars, at the start, the second, of fifteen hundred dollars, at the end of twelve months from the date of the agreement; fifth, that each should employ all his time and skill in the business; sixth, that the partnership should continue three years; that the appellant paid in \$2,702.45, \$297.55 less than his share; that Elston paid in \$3.151, \$151 more than his share; that Hazelton paid in \$1,443.75, \$56.25 less than his first instalment, being all he ever paid in; that the capital stock paid in was \$7,297.20; that the partners with the said paid in capital bought land and machinery, and constructed buildings necessary to carry on the business; that on the 26th of August, 1867, with common consent, Wm. F. Elston sold his interest in the said firm to Isaac C. Elston, who by like consent became a full partner in place of his vendor; that on the 24th day of October, 1867, Isaac C. Elston departed this life, by means whereof the said partnership was dissolved; that by common consent of all the parties in interest, Smith, the appellant, wound up the said partnership business; that he continued the said business until it was closed; that the amount of the partnership assets at the time of the dissolution, exclusive of the realty, was \$9,083; that the joint liabilities of the said firm at the same date amounted to \$7,215; that at the winding up finally he paid of joint liabilities the sum of \$15,595.52, using for that purpose the personal assets alone; that the realty, consisting of the factory, machinery, fixtures, and appurtenances, was thus left for distribution among the survivors and the representatives of the deceased, after an adjustment of the accounts between them; that on the 19th of May, 1868, Smith, the appellant, with the consent of Hazelton, sold a separate equal one-third interest in the said realty, to one C. W. Horn, for what amount is not stated; that on the day last aforesaid the heirs of the said Elston deceased sold their separate one-third interest in the said realty to C. W. Horn and Hazelton, the appellee, the price not stated, and as the appellee was one of the

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purchasers, the sale must have been made with his knowledge and consent; that on the 15th day of March, 1869, the said Hazelton, the appellee, sold and conveyed one equal one-third interest in the said realty, to the said C. W. Horn, and that this sale was made without the knowledge or consent of the appellant or the heirs of the said Elston; that of the business of the said copartnership nothing remains except to ascertain and finally adjust and settle the accounts and balances due and owing between the partners themselves; that the plaintiff was, at the time of the dissolution, indebted to the firm in the sum of eight hundred and forty dollars and one cent; that the firm was indebted to the said Elston, or his heirs, in the sum of one hundred and fifty-one dollars; that the said Hazelton was indebted to the said firm in the sum of one thousand seven hundred and eighty-four dollars and forty cents; that during the progress of the settlement of the said partnership business, the individual accounts between the said partners underwent material changes, so that at the time of the commencement of the action they stood thus: the plaintiff was indebted to the firm in the sum of six hundred and fifty-four dollars and twelve cents; there was due from the firm to the said Ristine, as administrator of the estate of the said Elston, the sum of one hundred and fifty-one dollars; the said Hazelton, the appellee, was indebted to the said firm in the second instalment of his capital stock in the said firm, which was to have been paid at the end of twelve months after the formation of the said partnership, the principal and interest of which amounts to the sum of two thousand three hundred and sixty dollars and thirty-eight cents; that there is coming to the plaintiff, after paying to the said firm the said sum of six hundred and fifty-four dollars and twelve cents, the sum of seven hundred and seventy-seven dollars and sixty-three cents, that being his fair proportion of the amount due to the said firm from the said Hazelton; and that the estate of the said Elston was entitled to the sum of one thousand five hundred and eighty-two dollars and

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seventy-five cents out of the amount so due from the said Hazelton to the said firm. The prayer of the complaint was, that there should be an accounting and a final settlement between the parties, and that he may have judgment for the said sum of seven hundred and seventy-seven dollars and sixty-three cents, or so much as may be finally adjudged due and owing to him, and for all proper relief. There was filed with the complaint exhibits showing in a detailed and tabular form the business of the said partnership and the account of each member of the firm.

Benjamin F. Ristine, administrator of the estate of Isaac C. Elston, deceased, was made a party defendant, and appeared and put in an answer, in which he admitted the truth of the matters alleged in the complaint, and asked for a judgment against the appellee for the sum of one thousand five hundred, and eighty-two dollars and seventy-five cents.

The appellee appeared and demurred to the complaint, on the ground that it did not contain facts sufficient to constitute a cause of action. The demurrer was sustained, and the appellant refusing to amend, judgment was rendered for the appellee.

There is a bill of exceptions signed by the judge of the court and made a part of the record, in which it is said that the demurrer was sustained to the complaint on the following grounds: "that the complaint shows certain real property belonging to the partnership as firm property, and subsequent sales of the respective legal interests in the same before settlement of the equitable claims existing between the surviving partners, and at the same time fails to set forth and account for the purchase-money received by the parties from their several sales as assets of the partnership subject to distribution proportionally amongst the parties interested, without which no adjustment of the claims prayed for could be had."

The real question submitted for our decision is this: Three persons became partners. The capital stock agreed upon was nine thousand dollars. The partners were each to pay

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in three thousand dollars. Two of the partners paid in substantially their shares of capital stock. The other paid one-half, and agreed to pay at the end of twelve months the residue of his stock. The partners purchased real estate, machinery, and materials, and engaged in business. One of the partners died, and thereby the partnership was dissolved. By the consent of all the parties one of the partners closed up the business. The partnership debts and liabilities were paid out of the personal property belonging to the firm. The real estate was left unencumbered of partnership debts. The partners sold the real estate to a third party, and each of the parties received the consideration of the sale of his one-third interest in the real estate belonging to the firm. Two of the partners paid their full shares of the capital. The third had only paid one-half of his share of the capital. The partner who had paid only one-half of his stock received of the partnership assets one full and equal third.

It is now claimed by the appellee that he is entitled to share equally with his copartners in the partnership assets, although he only contributed one-half as much of the capital stock as the other members of the firm. It is also claimed by the appellee that the ruling of the court in sustaining the demurrer to the complaint was correct, because the plaintiff did not in his complaint offer to account for the consideration of his sale of one-third of the partnership lands. The object of the appellant in bringing this action was to compel an accounting and settlement of the partnership affairs. In his complaint he asked for a judgment for a sum certain, or for so much as may be adjudged due and owing him, and for all other proper relief. It is now claimed by the appellee that he is entitled to share equally in the profits of such partnership and division of the property belonging to the said firm, although he only contributed one-half as much to the capital stock of said partnership as the other partners did. In our judgment, this is not the law. It violates every principle of equity. Equality is equity. Before a partner is entitled to share equally in the profits

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and property of a partnership, he must have paid in his full and equal share of the capital of such firm, in a case where the partners are to contribute equally to the capital stock. *Jackson v. Crapp*, 32 Ind. 422. .

It was error for the court below to sustain a demurrer to the complaint, if the plaintiff was, upon the facts stated, entitled to any relief, although he was not entitled to all the relief prayed for. The object of the bill was to obtain an accounting and settlement of the partnership affairs and a distribution of the surplus after the payment of partnership debts. The court might have compelled the plaintiff to make his complaint more specific by alleging the amounts received by the several partners for the real estate by them sold; and the appellee might have presented the matter in an answer. In such a case as the one under consideration, it was the duty of the court to ascertain the amount that each partner had paid into the capital stock, the amount that he had received in property or profits, and the amount of the surplus remaining after the payment of the partnership debts; and if by the terms of the partnership the partners were to be equal in the capital stock and in the profits and losses, any balance remaining unpaid of the capital stock should have been deducted from the amount received by such partner, and the partners who had received more than their share should pay to the other partners such sums as would make them equal.

Judgment reversed, with costs, and the cause remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings.

L. Wallace and Rogers & Brown, for appellant.

C. H. McCarty, N. F. Malott, and T. R. Cobb, for appellees.

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SUPREME COURT.—*Harmless Error*—The Supreme Court will not reverse a ruling of a lower court upon a minor question of practice, where it is not apparent that an injury has been done by such ruling.

FRAUD.—*Pleading*.—*Mutual Insurance Company*.—*Premium Note*.—Suit by the receiver of a mutual insurance company upon a premium note executed to said company by the defendant, whose answer and cross complaint, set out in the opinion of the court, alleging, at great length, fraudulent representations of the agent of said company as to matters of law and of fact, &c., was held sufficient on demurrer.

APPEAL from the Laporte Circuit Court.

PETTIT, C. J.—The appellant, a receiver of the Sinnissippi Insurance Company, which was organized under a general law of this State, 1 G. & H. 395, brought suit on three notes made by the appellees payable to said company, dated respectively May 29th, 1865, for eight hundred dollars, February 24th, 1866, for eight hundred dollars, December 1st, 1865, for one hundred dollars. The complaint had three paragraphs.

The appellees answered, first, by general denial; and second, as follows: "For second ground of defense, and by way of cross complaint as to each and all of said paragraphs in said complaint mentioned, the defendants say that heretofore, to wit, on the 29th day of May, 1865, and from that time until long after the 24th day of February, 1866, they were wholly uninformed and ignorant as to the nature of the organization, character, and responsibility of the Sinnissippi Insurance Company, and as to the law under which the same was organized, and had no knowledge as to whether it was solvent and responsible and managed with a view to promote the interests of the parties insured, or for the benefit of the parties managing the same; that they were both Germans and but slightly acquainted with the laws and regulations governing such institutions in the State of Indiana, and were obliged to rely chiefly on the opinions and information of other persons, who were better informed in such

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matters ; that thereupon, on or about the said day, the said Sinnissippi Insurance Company, by its agent, applied to the defendants, at Laporte, to insure their said factory and property connected therewith, in said company. At that time, Christian Houser and one D. W. Weir owned a large tannery situate in said city, and it was known both to said agent and the defendants that said Weir had for a long time resided in Indianapolis, where said insurance company was located, and where it had its office, and said defendants placed much confidence in the business capacity, knowledge, and vigilance of said firm, and therefore, knowing and seeking to take advantage fraudulently of such confidence, said agent called on the defendants and urgently requested and advised them to insure their said property in said company ; and to induce them to do so, falsely and fraudulently stated and represented to them that said company was entirely solvent and responsible, and that by its charter it was forbidden to assess or collect from persons insured more than at the rate of ten per cent. per annum on the amount of its premium notes, and that in all probability the rate to be assessed and collected would be less than at that rate, and that no assessment would be made the first year ; and he also at the same time falsely and fraudulently stated and represented to them, with the purpose aforesaid, that said Houser and Weir had agreed with him to insure their tannery in said company, and that they had done so for the reason that said Weir had so lived at Indianapolis and well knew about the character and responsibility of said company. And thereupon the defendants, not doubting the truth of said representations, and in unhesitating reliance thereon, and upon the judgment and opinion of said Houser and Weir, which from said representations they supposed and believed had been most strongly expressed by such act and agreement in favor of the solvency and responsibility of said company and of its being a desirable company in which to effect insurance, did consent to and agree to insure their said property in said company, and did then and there pay to said agent the sum of eighty dollars

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as a down payment, and did execute and deliver to him the said promissory note for eight hundred dollars, which is set forth in said complaint as 'exhibit A,' and is on its face expressed to be for value received in policy No. 3,784; and the company presently afterwards, in consideration thereof, executed and delivered to them said policy number 3,784, by which, in consideration of said note and of said eighty dollars, they promised to insure said property and factory therein mentioned to the 23d day of May, 1872, in the sum of two thousand dollars against all loss by fire. Said original policy is now on file in this court, attached as an exhibit to the deposition of one E. B. Martindale, heretofore taken in a cause in this court brought by said insurance company against these defendants on the same identical notes which are the foundation of this suit, and which was dismissed at the last term of this court for want of prosecution, and to which original policy reference is hereby made. The defendants further state and charge that said representations were wholly false and fraudulent and were intended to deceive and mislead the defendants; that said company was not restricted to her assessment of not exceeding ten per cent. per annum on said promissory note; that the affairs of said company were such at that time that it was certain that assessments of far more than that rate would be necessary; that the affairs of said company were then being badly managed, and it was on the point of total insolvency; and that said Houser and Weir had not agreed and never did agree or contract or insure their said tannery in said company, but on the contrary thereof, they had positively refused to do so, on account of the knowledge and belief of said Weir that said company was an unsafe and improper company in which to effect such insurance. And the defendants state that had they known of or suspected the falsity of any one of said statements of said agent, they would not have effected such insurance or given said notes.

"The defendants further state that at the time of the giving of said note for eight hundred dollars, they did not make

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said payment in cash of eighty dollars, but by direction of said agent executed their note to said company for the same, payable on the — day of —, 1865; and that before learning the falsity of said statements, or of any of them, they were called upon by said company to pay said note for eighty dollars, and did actually pay the same, but not till after the said policy had been so issued to them.

“The defendants further state that nothing occurred between the time of giving the notes hereinbefore mentioned, and after the acceptance of said policy, and the 1st day of December then next, and until after the giving of the said other two notes in said complaint mentioned, and which are therein set forth as exhibits ‘B.’ and ‘C.,’ to awaken any suspicion or doubt in the minds of the defendants as to the truth of said representations of said agent of said company, and, on the contrary, they continued to rely thereon, and never during all that time doubted or had any cause, within their knowledge, to doubt their truth; and while they continued in such reliance and confidence, to wit, on the said 1st day of December, 1865, said company by its agent again called on the defendants at said city of Laporte, and advised and requested them to effect a further insurance on said property in said company for a like sum of two thousand dollars, for which they represented that a policy of insurance should soon thereafter be issued to them by said company, and requested the defendants to give to them a similar premium note for eight hundred dollars, as for value received in such policy number 5,074, to be thereafter issued to them by said company, and also to execute to them a note for one hundred dollars payable on the 24th day of February, 1866. And thereupon they did, in such faith and reliance on said former representation, and for no other consideration whatever, so execute and deliver to said company, on the said 1st day of December, 1865, the said note for eight hundred dollars, which is set forth in said complaint as exhibit “B,” and the said other note for one hundred dollars, which is therein set forth as exhibit “C,” and which two notes, together with

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said other note for eight hundred dollars, are the sole foundation of this suit. But the defendants further state that before said last mentioned policy was issued to them, and at some time between the said 1st day of December, 1865, and the 21st day of said month, said company notified them by letter, that they had made an assessment on said first mentioned premium note of a large sum of money, to wit, forty dollars, and required the same to be paid to it at Indianapolis shortly thereafter, which was wholly in violation of the assurances so given by said agent; that thereupon the suspicions of the defendants were excited as to the truth of the statements of said agent which had been so made to them, and on inquiry they became satisfied that said representations were all false, and thereupon at once determined that they would surrender and abandon said first mentioned policy, and would not accept said other policy which said company had so promised to issue to them. But, in order to avoid litigation, they determined to forward to said company said sum of forty dollars so assessed, and at the same time to cancel and return to said company said first mentioned policy. Thereupon they wrote, placing across the face of said first mentioned policy, and signed in their own proper hands, the following words, to wit:

LAPORTE, December 21st, 1865.

We, F. W. Meissner and C. W. Frankel, the parties insured in this policy, considering the said policy as worthless and of no value, and having been assured by the agent of said company that there would be no assessment on said premium note for one year, which is now assessed for forty dollars, we hereby cancel this policy, and surrender the same to the company, and demand our premium note herein mentioned.

Signed)

F. W. MEISSNER.

C. W. FRANKEL.

Witness,

GEORGE L. SEYMOUR.

“The defendants further state that they did thereupon, without delay, forward said policy to Indianapolis, and caused the same and the sum of forty dollars to be tendered to said

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company, and requested that said premium note be surrendered and canceled, which reasonable request was wholly refused by said company. The defendants further state that, although they had fully determined never to accept said second policy, or to pay either or any part of the two last mentioned notes, yet after the time when said other policy was so canceled, the said company did make out said policy number 5,074, as of the date of December 1st, 1865, and inclosed the same by mail to the defendants at Laporte, and the defendants, not knowing what was contained therein, took said letter from the post office and found therein said policy, and the same has ever since remained in their possession, but without any purpose or intention of relying thereon and holding the same as of any value or accepting the same. And the defendants have ever since been desirous to surrender the same to said company to be canceled and to receive back their said notes. But so it is, that said company insists that by reason of the defendants having so taken said policy from the post office, without knowing when they did so what it was, they have become bound to pay said notes, notwithstanding said frauds and the settled purpose aforesaid of the defendants. Said defendants herewith exhibit said last mentioned policy, to be canceled, or to be surrendered to said company, as may be deemed proper. The defendants further state and charge that said last mentioned policy and the said notes would have been void even if there had been no fraud on the part of the company, and if the same had been assented to by them, for the reason, among others, that they are now advised that the charter of said company requires, as a condition to the issuing of such policy, that a certain amount of money should be paid in cash in advance, which was not done and was not required by said company, and as to the necessity for which the defendants were wholly ignorant until long since the occurrence of all the facts above herein set forth.

“The defendants further state that as they are also now advised, said first mentioned note and said first mentioned policy

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were also void, for the reason that it is provided in said note that no assessment thereon should exceed the rate of ten per cent. on the face of said note, a condition which the defendants have never in any manner consented to waive, and as to the illegality of which they had no knowledge at the time of the giving of said note or until long after the giving of all of said notes. The defendants now offer to surrender up both of said policies of insurance, to be canceled or disposed of as to the court may seem just. The defendants pray that said plaintiff may be compelled to answer this cross complaint; and will the court decree that said notes in said complaint mentioned be surrendered to the defendants, to be canceled, and said plaintiff be restrained and enjoined from setting up or asserting any claim, right, or title thereto, or from ever attempting to collect said moneys therein mentioned or any part thereof; and will the court grant to defendants such other and further relief in the premises as may seem just. And said defendants aver that inasmuch as there are doubts as to the authority of the court to finally adjudicate all the matters in controversy herein, they pray that said Sinnissippi Insurance Company may be made a defendant to this cross complaint and compelled to answer the same."

To this there was a demurrer filed, for the cause that it did not contain facts sufficient to constitute a defense to the action, or to entitle the defendants to the relief asked for. The cause was continued, and at the next term the demurrer was withdrawn, and a motion filed asking that the defendants be required to separate and number the different paragraphs of said second paragraph and cross complaint. The defendants interposed a motion to strike out the former motion, because the plaintiff had previously demurred, and because it was not necessary to the ends of justice. The last motion was sustained, and we think there was no error in doing so. In the minor questions of practice, this court will not reverse the rulings of the court below unless we can see that an injury has been done to the adverse party, which we are unable to see in this ruling. If this latter

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motion had not been made by the defendants, the court ought to have overruled the motion of the plaintiff, because there are no separate paragraphs to number in the second paragraph of the answer and cross complaint.

This paper is not artistically drawn, and possibly might have been improved by proper motions to strike out or set aside certain parts or phrases of it; but, taken as a whole, it can only be construed as an answer and cross complaint to the whole of plaintiff's cause of action.

The demurrer was refiled to this answer and cross complaint, overruled by the court, and exception. Was this ruling correct? is the only remaining question before us.

We answer, it was. There is enough of fraud and mistake stated and shown to make it a good defense to the action, and to require a reply to it as an answer, and an answer to it as a cross complaint.

This opinion has been made very long by our being compelled to copy the answer and cross complaint, to give an intelligent understanding of the facts upon which we rule the law, and we shall content ourselves by making a few citations, which we think warrant our conclusions. As to separating the second paragraph of the answer and cross complaint, see *Morris v. Graves*, 2 Ind. 354; *Detro v. The State*, 4 Ind. 200; *Hiberd v. Myers*, 5 Ind. 94.

As to the fraud, see 2 Parsons Con. (3d ed.) 268, 276; *Foley v. Cowgill*, 5 Blackf. 18; *Cronk v. Cole*, 10 Ind. 485; *Russell v. Branham*, 8 Blackf. 277; *Clem v. The Newcastle, &c., R. R. Co.*, 9 Ind. 488; *Louchheim v. Gill*, 17 Ind. 139; 1 Story Eq. § 137.

As to mistake of law under certain circumstances, see 1 Story Eq. §§ 120, 130; *Cooke v. Nathan*, 16 Barbour, 342; 1 Story Eq. § 137, *n* 1; *Bank of the U. S. v. Daniel*, 12 Pet. 32; *Keller v. Equitable Fire Ins. Co.*, 28 Ind. 170.

As to the time to awaken suspicions, or how long a party may rely on former representations, see *Keller v. Equitable Fire Ins. Co.*, *supra*. As to what a person shall do who is a

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member of such company, and how it must be done, see 1 G. & H. 395, sec. 45..

We have said more, and labored more, than we ought to have done in this case.

The judgment is affirmed, with costs.

L. A. Cole, E. L. Bennett, J. E. McDonald, A. L. Roache
and *E. M. McDonald*, for appellant.

J. B. & W. Niles, for appellees.

LOWRY V. SHANE and Another.

EVIDENCE.—Pleading.—Promissory Note.—In a suit on a promissory note, want of consideration, mistake, or the concurrent execution of an instrument that may modify or control the legal effect of the note, cannot properly be given in evidence by the defendant under an answer of payment, and if given in evidence, cannot establish such an answer.

APPEAL from the Ripley Common Pleas.

WORDEN, J.—This was an action by the appellant against the appellees. Issue, trial by the court, finding and judgment for the defendants. The suit was upon a promissory note executed by the defendants, on the 31st of December, 1867, to Loudheimer & Weiskoff, for the sum of two hundred dollars, payable ninety-five days after date, at the First National Bank of Lawrenceburg, Indiana, and endorsed by the payees to the plaintiff. The complaint does not seem to have been drawn with any special reference to the law governing notes payable at a bank in this State, as it does not appear therefrom when the note was endorsed to the plaintiff, whether before or after maturity, nor does it appear therefrom that the endorsement was made for a valuable consideration.

The defendants answered, first, by general denial; and second, that before the commencement of this suit, the defend-

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ants paid to the plaintiff's assignors, before notice of the assignment, the full amount of the note. Reply in denial.

On the trial, the plaintiff showed that he was a purchaser of the note for value, before maturity, without notice of any equities between the original parties, and was entitled to whatever rights the law would give him as such holder. But the case was tried upon the theory that payment by the makers to the payees, before notice to the makers of the assignment, would defeat the right of the holder. No objection was made to the paragraph of the answer alleging such payment.

We think, however, that the evidence utterly failed to sustain the answer of payment. It did not even tend to prove such payment. It should be observed that the plaintiff gave the note in evidence, which, *prima facie*, made out his case.

It appears that the note was given on settlement of a large account between the makers and payees thereof, for a balance found due the payees, but the makers claimed that they had not been credited with the sum of two hundred dollars for which they should have had credit; but the payees claimed that the makers had been credited for all that had been paid.

At the time of the settlement and the execution of the note, the payees executed to the makers the following instrument, viz.:

"CINCINNATI, Dec. 31st, 1867.

"We, the undersigned, agree and bind ourselves to correct William Shane, Esq.'s account if there be an error in said account, according to a statement we gave said William Shane this day, showing a balance in our favor of four hundred and eighty-two dollars. Said William Shane claims to have given us an order on Hugh Morgan, Esq., of this city, which fact we admit and claim we have given him credit for same, November 30th, 1866, amounting to two hundred dollars. Said order was given to us by said Shane on H. Morgan before said Morgan paid us the money. We do not remember the date of said order. If the above credit of November 30th, 1866, of two hundred dollars was not

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paid us by H. Morgan, then said William Shane must show and prove by whom said two hundred dollars credited to him November 30th, 1866, was paid.

(Signed) LOUDHEIMER, WEISKOPF & Co."

The evidence turned upon the question whether or not the proper credit had been given, in the settlement, for the order on Morgan. There was no pretense that anything had been paid on the note subsequent to its execution. Admitting that the proper credit had not been given on the settlement, and consequently, that the note was without consideration and executed through mistake, still the plea of payment was utterly unsupported. The evidence was inadmissible under the issues, but was received over the objection of the appellant. We think that the want of consideration, mistake, or the concurrent execution of an instrument that may modify or control the legal effect of a note, cannot be given in evidence under a plea of payment, or, if given in evidence, cannot establish such plea. These are propositions too clear to require the citation of authorities in their support.

The judgment below is reversed, with costs, and the cause remanded, with leave to the parties to amend their pleadings.

W. D. Ward and *J. O. Cravens*, for appellant.

E. P. Ferris and *H. T. Lipperd*, for appellees.

KALBRIER v. LEONARD.

CITY.—*Street Improvement.*—*Appeal from Precept.*—Appeal from a precept issued for the collection of an assessment for the construction of a plank walk in the city of Mt. Vernon, under a contract with said city. Answer, that the defendant was then, and for ten years past had been, the owner of a tract of land of more than ten acres in one body, lying within the limits of said city

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and used by him for agricultural purposes only, and that said tract of land had never been laid off into lots, and was not subject to be taxed for city purposes of any kind; that said city within the last ten years, without the consent of defendant, had laid out a street through and across said land; and that said sidewalk, caused to be laid down by the city, the cost of which is charged against the defendant and his property, is laid on the west side of said street where the same crosses the land of defendant.

Held, that the answer was bad on demurrer.

SAME.—Presumption.—In such case it will be presumed that such street was legally laid out and opened, and that if the land-owner was damaged thereby, and claimed compensation, he received it.

SAME.—Tax.—Statute Construed.—The provision of section 58 of the general act of 1867 for the incorporation of cities, "that no more than five acres of farming land shall be subject to taxation within such city," does not apply to assessments for improvements of streets and sidewalks.

SAME.—Judicial Notice.—Mt. Vernon.—It seems that perhaps the Supreme Court may judicially know that Mt. Vernon is a city of less than ten thousand inhabitants.

APPEAL from the Posey Common Pleas.

DOWNEY, J.—The appellee was the owner of a tract of land of ten or more acres within the corporate limits of the city of Mt. Vernon. The city council, without the consent of Leonard, opened a street through it, and some years afterwards, on one side of the street, ordered the construction of a plank walk, which Leonard having refused to construct, was done under contract with the city by the appellant. The cost of its construction was charged against the land of Leonard, and a precept issued for its collection. Leonard appealed to the common pleas, where he answered, first, that he was then, and for ten years past had been, the owner of a tract of land of more than ten acres in a body, lying within the limits of said city of Mt. Vernon, and used by him for agricultural purposes only; that said tract of land had never been laid off into lots, and was not subject to be taxed for city purposes of any kind; that said city within the last ten years, without the consent of said defendant, has laid out a street through and across said land; and that the four hundred and one feet of the sidewalk caused to be made and laid down by the city, the cost of which is charged against the defendant and his property, are laid on the west side of.

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said street, where the same crosses the land of said defendant, wherefore, &c.; second, the general denial.

There was a demurrer by the appellant to the first paragraph of the answer, which was overruled, and an exception properly taken. The appellant failing to reply, there was final judgment for the appellee.

In the common pleas, the appeal was docketed, and the pleadings filed, in the name of the city against the appellee; but the parties, by agreement indorsed on the transcript, correct that mistake, and agree that the case shall be treated as a case by Henry Kalbrier, the contractor, against the appellee.

The only error assigned is the overruling of the demurrer to the first paragraph of the answer.

As to the allegation in this paragraph of the answer, that the city had, within the last ten years, laid out a street through the premises, without the consent of the appellee, we do not see how it can affect the question. We must presume that the street was legally laid out and opened, and that if the appellee was damaged thereby, and claimed compensation, he received it. 3 Ind. Stat. 94, sec. 61, *et seq.*

It is urged by the appellee, that the land was not subject to taxation, and we are referred to section 58 of the same statute, and particularly to that part which says, "that no more than five acres of farming land shall be subject to taxation within such city." But we think it very evident that none of the provisions of this section apply to assessments for improvements of streets and sidewalks. The tax contemplated by that section is "for general purposes," and the limitation of the tax to an amount "not more than one per centum" cannot, by any possibility, apply to the assessments provided for in section sixty-eight for the improvement of streets and sidewalks.

Assuming that Mt. Vernon is a city of less than ten thousand inhabitants, which possibly may be within the range of our judicial knowledge, though of this we are not quite certain, it seems to us that that part of section sixty-eight em-

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braced in the first proviso meets this case with reference to the power of the city to charge the improvement on the land. It is as follows: "*provided*, that any incorporated city having a population less than ten thousand, may, by a two-thirds vote of all the members of the common council, cause plank or gravel walks, of such dimensions as such council shall determine, to be constructed, either upon the natural grade of the sidewalks therein, or any modification thereof established by such council, and the costs and expenses of any such improvements or repairs thereto shall be a lien upon the real estate fronting thereon, and shall be assessed and collected in the same manner as now prescribed by law for collecting assessments for improving streets, alleys, and sidewalks."

Though the former part of the section speaks only of lots and parts of lots, it will be observed that the part of the section having reference to the construction of plank or gravel sidewalks, above quoted, uses the term "real estate." Then section seventy-one says, "In case any of the owners of lots or *parcels of ground* on which such assessments have been made shall fail or refuse to pay," &c.; still carrying out the idea that these assessments are not necessarily confined to lots and parts of lots.

Counsel for the appellee discuss several questions with reference to the regularity of the proceedings resulting in the assessment and issuing of the precept. But we do not think it necessary to decide these questions, as the case will hardly present itself again in the court below in the same form as before.

It may be well enough, however, to remark that many of the objections to a proceeding of this kind can only be made by injunction, before the making of the improvement. 3. Ind. Stat. 102 and 103; *Palmer v. Stumph*, 29 Ind. 329; *Hellenkamp v. The City of Lafayette*, 30 Ind. 192.

Judgment reversed, with costs, and cause remanded, with instructions to sustain the demurrer.

W. Harrow and *W. M. Hoggatt*, for appellant.

J. & H. C. Pitcher, for appellee.

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THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD COMPANY v. PARKHURST.

SUPREME COURT.—*Justice of the Peace.*—*Demurrer.*—On appeal to the Supreme Court from the court of common pleas in an action commenced before a justice of the peace, no notice will be taken of the ruling of said justice on a demurrer.

RAILROAD.—*Injury to Animals.*—*Statute Construed.*—*City.*—The statute making railroad companies liable for injuries to animals without regard to wilful misconduct, negligence, or accident, where the railroad is not fenced, applies to a place within the limits of a city where it would not be illegal or improper to maintain a fence.

Same.—*Evidence.*—*City.*—In an action against a railroad company to recover damages for the killing of stock by a passing train, the court instructed the jury, first, that to enable a person to recover under said statute, he must show that the place where the animal went upon the railroad was at a point where the railroad company was bound to fence the road, and that the road was not fenced at said point; or that the company was bound to maintain a cattle-guard at said place, and that such guard was not in proper condition to keep stock off the railroad; second, that said statute does not apply to the crossing of a public street or alley in a city, or a place within a city where from the necessary use of the grounds it would be unlawful or unreasonable to require the railroad company to maintain a fence; third, that a railroad company is not bound under said statute to erect and maintain cattle-guards at the crossings of public streets and alleys within the corporate limits of a city, or to fence the lots lying on either side of the railroad track between such crossings; but beyond such crossings the company is bound to maintain fences and guards, the same as outside the corporation.

Held, that the defendant could not complain of these instructions.

APPEAL from the Johnson Common Pleas.

PETTIT, C. J.—This suit was brought before a justice of the peace, by the appellee, against the appellant, for killing a cow by its train of cars. There was a judgment for the appellee before the justice, and appellant appealed to the said court of common pleas. Trial, and judgment for appellee in that court, from which it is brought to this court by the appellant.

The errors assigned in the record are, first, that the court erred in giving instructions, one, two, three, four, five, and six, excepted to by appellant; second, the court erred in refusing to give instruction one, asked by appellant, and ex-

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cepted to; third, that the verdict was contrary to the evidence; fourth, that the court overruled the motion of appellant for a new trial; fifth, the court overruled demurrers to the first and second paragraphs of the complaint.

Upon the saying that the first shall be last, and the last shall be first, we will commence with the last assignment; and upon this it is enough to say that, as no objection in any form was taken to these paragraphs in the common pleas court, though they were demurred to before the justice of the peace, and the demurrer by that officer overruled, we cannot inquire as to their sufficiency.

We cannot reverse, affirm, or modify, the rulings or judgment of a justice of the peace brought before us in this form: We can only take notice of the proceedings of the court of common pleas.

As to the fourth assignment, we think there was no error in overruling the motion for a new trial.

As to the third assignment, we have only to say, that it is not known to our law or practice as an assignment of error, and can only be regarded as an argument or reason under the fourth assignment of error.

As to the second assignment of error, refusing to give instruction asked, which was as follows: "If the jury find from the evidence that the cow in question came upon the railroad track, and was killed, within the corporate limits of the city of Franklin, then the plaintiff cannot recover on the first paragraph of the complaint herein," there was no error in refusing to give this asked instruction. *The Indianapolis and Cincinnati R. R. Co. v. Parker*, 29 Ind. 471, and cases cited there.

The first assignment of error is the giving of instructions, which are as follows:

"1st. This is an action by the plaintiff against the defendant to recover damages for the killing of a cow on the track of the defendant, in Johnson county, and the plaintiff sets up in his complaint two grounds of recovery.

"2d. The first paragraph of the complaint alleges that the

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cow was killed at a point on the railroad where it was the duty of the defendant to fence against stock, and that the defendant had not so fenced in her track, by reason of which the cow strayed upon the track, and was thus killed.

"3d. The second paragraph of the complaint alleges, that the defendant so carelessly and negligently ran her locomotive and cars over the road, that the cow was killed by reason of such negligence in the defendant.

"4th. To enable the plaintiff to recover on the first paragraph of the complaint, he must show that the place where the cow strayed upon the railroad was at a point where the company were bound to fence the road, and that such point was not so fenced, or that such point was where the company were bound to maintain a cattle-guard, and that such guard was not in proper condition to keep stock off the track of the road.

"5th. If you should find from the evidence in this case that the place where the cow got on the track was inside the corporate limits of the city of Franklin, you must further find that such place was not at the crossing of any street or alley, or at a point where, from the necessary use of the grounds, it would be unlawful or unreasonable to require the railroad company to maintain a fence, before the road would be liable for not fencing.

"6th. The railroad company would not be bound to erect and maintain cattle-guards at the crossings of the public streets and alleys inside the corporate limits of the city of Franklin, nor would said road be bound to fence the lots lying on either side of her track between the crossings of such streets or alleys over the railroad; but beyond such crossings, the road would be bound to maintain her fences and guards, the same as if running outside the corporation."

We think and hold that there was no error in giving these instructions, and that they were clearly the law of, and proper in, the case. The appellant could not complain of them.

The judgment is affirmed, with ten per cent. damages and costs.

Sangster v. Prather.

G. M. Overstreet, A. B. Hunter, D. D. Banta, and C. Byfield, for appellant.

S. P. Oyler and D. W. Howe, for appellee.

SANGSTER v. PRATHER.

VENDOR AND PURCHASER.—*Fraudulent Representations.—Measure of Damages.*—Where in a sale of an undivided one-half of a tract of land, the vendor falsely and fraudulently represented to the purchaser that there was then upon said land a house of a particular size and description;

Held, that the measure of damages for the lack of such house, in a suit by the purchaser against the vendor for such fraudulent representation, was one-half the amount of the increase there would have been in the value of said land if there had been such a house upon it at the time of the sale, and not merely one-half the amount of money it would then have taken to put such a house on the land.

APPEAL from the Fountain Circuit Court.

DOWNEY, J.—This was an action brought by the appellee against the appellant for fraudulent representations with reference to the quality, situation, improvements, and value of certain real estate, the undivided one-half of which he had conveyed to the appellee. Among other alleged false representations was this: that there was erected and finished on the land a frame house containing three rooms, except that the rooms were not plastered.

Issues were formed, and there was a jury trial of the case, and finding and judgment for the plaintiff. A motion for a new trial was made, on the grounds that the verdict was contrary to law and not sustained by sufficient evidence, and because the court refused proper, and gave improper, directions to the jury. This motion was overruled, and the defendant excepted. The evidence is not in the record.

It is assigned for error, first, that the court erred in refusing to give a certain instruction asked for by the defend-

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ant, as shown by the bill of exceptions; second, the court erred in giving a certain instruction over the objection of the defendant below; third, in overruling the defendant's motion for a new trial.

The whole case is reduced down to the single question relating to the instructions.

The defendant asked this instruction: "That in case the jury find from a preponderance of testimony that the defendant represented a house of a particular size and description, and further that the jury find that the plaintiff is not barred by the statute of limitations, that there is a measure of damages for the lack of such house in the amount of money that it would have taken at the time to put such a house on the land, and that one-half the value of such house will inure to the benefit of such joint owner."

The court refused to give this charge as asked, but modified it by leaving off all commencing with the word "amount," and extending to the end of the charge, and giving in lieu of that part of it these words: "difference in the value of said land with said house on it and the value without it, and one half the increased value of the land with the house on it would inure to the benefit of such joint owner."

Without avoiding the direct decision of the question presented, which, as the evidence is not in the record, perhaps we might do, we think the instruction as modified was right, and that the instruction as asked was not correct. To estimate the damages at one-half of what it would cost to build the house as the rule, would deprive the plaintiff of the use of the house during the time that would be consumed in its building. We think that the rule given by the court to the jury by which to measure the damages was the correct one. The charge of the court, as modified, was sufficiently favorable to the defendant, and he has no good reason to complain of it. This was not a suit for breach of contract, but was for a tort. The rule applied to the case by the court was the rule in suits on contract. *Jones v. Van Patten*, 3 Ind. 107; *Street v. Chapman*, 29 Ind. 142.

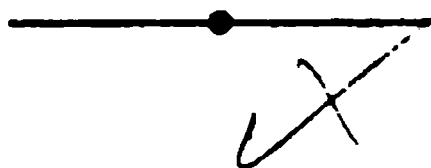
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But this was a suit for fraud, in which the jury is not confined to exact pecuniary compensation, but may, under some circumstances, go beyond that. *Millison v. Moch*, 17 Ind. 227; *Taber v. Hutson*, 5 Ind. 322.

The judgment is affirmed, with five per cent. damages and costs.

J. Ristine and *S. C. Willson*, for appellant.

T. F. Davidson and *J. M. Butler*, for appellee.



THE PRESIDENT AND TRUSTEES OF HARTSVILLE UNIVERSITY
v. HAMILTON.

PLEADING.—Abatement.—Corporation.—In a suit on a promissory note executed to a corporation, brought by the payee against the maker, the fact that the corporation has ceased to exist since the execution of the note may be pleaded in abatement, but not in bar. Such answer in abatement must show that the corporation has come to an end by some legal process; the facts upon which the forfeiture of its franchises might be declared cannot be tried in such collateral suit.

FRAUDULENT REPRESENTATIONS.—A false representation upon which fraud may be predicated must be of an existing fact, or a fact alleged to exist at the time, and cannot consist of a promise to be performed in the future or of a false statement as to the legal construction or effect of a written contract executed by the person to whom the representation is made at the time of the making of the representation.

CONTRACT.—Consideration.—Certificate of Scholarship in University.—In a suit on a promissory note executed by the defendant to a university for a perpetual scholarship therein, the fact that no certificate of scholarship has been delivered or tendered to the defendant cannot constitute a defense.

APPEAL from the Clinton Common Pleas.

PETTIT, C. J.—Suit by appellant against the appellee on five promissory notes, all of the same date, tenor, and effect, except as to the time of payment, as the following copy:

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“§20.

STATE OF INDIANA, CLINTON COUNTY,

JULY 24th, 1854.

“On or before the 12th day of May, 1867, I promise to pay to the President and Trustees of the Hartsville University, at the office of their treasurer in Hartsville, in the county of Bartholomew, and State of Indiana, the sum of twenty dollars, being the first instalment on a perpetual scholarship in said university. THOMAS M. HAMILTON.”

The defendant answered in three paragraphs, as follows:

1st. “That he admits that he executed the notes referred to in plaintiff’s complaint, but says that at the time of so doing said university was located at the town of Hartsville, in Bartholomew county, and State of Indiana; that by the terms of the organization of said corporation it was declared to be a university to be located at said place, but that after the execution of said notes, and before the maturity of the same, said university ceased to exist as a corporation; that the trustees of said university declared by resolutions passed at a regular meeting of said board, that they had been unfortunate in the location of said university at said place, and that they would seek another and better location, and for that purpose caused to be circulated subscription papers, for the purpose of soliciting donations to have said school located at Perryville, and also at Dayton, in Tippecanoe county; that for the period of six months and more the said university, by their trustees, were seeking, and by every effort in their power did seek, another and better location; and that afterwards the people of Hartsville, by their donations being greater than the other places, had said university relocated at said place, without any new organization, whatever, or charter; that said university during said time ceased to exist or exercise her corporate functions; and that by the express violation of the terms of her charter, said defendant was released from the payment of said notes.”

2nd. “For further answer, defendant says that the consideration of said notes was for a perpetual scholarship in the Hartsville University; that said trustees and president

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of said university, or any person in their behalf, has never tendered to said defendant said scholarship, nor has the said university ever been in a condition to make such tender or carry out such contract, as she, by the violation of her charter, ceased to be a corporation, and had no power to issue a perpetual scholarship."

3d. "And for further answer, defendant says that plaintiff falsely and fraudulently represented to defendant, and for the purpose of inducing the defendant to execute said notes, and which plaintiff knew to be false and fraudulent, that the principal of said notes should never be paid, that the express consideration of said notes was a perpetual scholarship in said university, that the interest on said notes should be the only amount that would be called for or ever demanded, and that amount should be and was ample to pay for all the perpetual scholarships that would be issued, and would be sufficient to defray all expenses of said university, and would be ample to endow said university, that if said defendant should not have a scholar or student attend said university, it would never cost him one cent, that also all persons that had made donations or executed their notes for perpetual scholarships had never been called upon for the principal and never would be; that defendant, relying upon said false and fraudulent representations, and believing them to be true, was induced to execute said notes, and did so, and it was entirely on these representations, and no other, that he was induced to enter into said contract. Defendant says that said president and trustees of said university have, for the last sixteen years, only demanded and collected the interest on said notes, and in no instance whatever have they, except in defendant's case, ever required or demanded the principal; that at the time of demanding the interest on said notes they promised they would make out and tender said scholarship, which they have never done, to defendant; and that defendant has never had a scholar in attendance at said university, nor has he ever received any scholarship, nor have they ever offered any to him. Wherefore, by reason of all

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the foregoing, he demands judgment for his costs, and other proper relief.”

The court properly sustained a demurrer to the second, and erroneously overruled separate demurrers to the first and third paragraphs of the answer.

To make the first paragraph of the answer good, it must have stated that the coporation had come to an end by some legal process; and its death or forfeiture cannot be tried collaterally in such a suit as this. *John v. The Farmers and Mechanics' Bank*, 2 Blackf. 367; *The Brookville, &c., Co. v. McCarty*, 8 Ind. 392; *Beaver v. The President and Trustees of the Hartsville University*, at this term of this court, *ante*, 245. Had it been well pleaded, it would have been an answer in abatement, and not in bar. *Meikel v. The German Savings Fund Society*, 16 Ind. 181.

The third paragraph is equally bad. False representations upon which fraud can be predicated must be of existing facts, or facts alleged to exist at the time, and not of promises to be performed in the future, or the legal construction or effect of a written instrument. *Fouty v. Fouty*, at this term of this court, *ante*, p. 433; *Beaver v. The President, &c., supra*. Verbal evidence can not be given to change or alter a written contract. See the above authorities, and also, *Mahan v. Sherman*, 7 Blackf. 378; *Parker v. Morton*, 29 Ind. 89; *Campbell v. Robbins*, 29 Ind. 271. All men must know the law of the place in which they are, and under which they contract. *Platt v. Scott*, 6 Blackf. 389.

The allegation that the certificate of scholarship had never been issued can be of no avail to give validity to this paragraph. It was unnecessary and unimportant that it should issue. It would have given the defendant no rights that he had not without. *Beaver v. The President, &c., supra*; *The N. A. & S. R. R. Co. v. McCormick*, 10 Ind. 499; *C. U. & F. W. R. R. Co. v. Pearce*, 28 Ind. 502.

The judgment is reversed, at the costs of the appellee; and the cause is remanded, with instructions to the court

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below to sustain the demurrers to the first and second paragraphs of the answer, and for further proceedings.

H. Y. Morrison and T. H. Palmer, for appellant.

J. Claybaugh, for appellee.

WHETSTONE v. DAVIS.

LANDLORD AND TENANT.—*Lease.—Construction of.—Notice to Quit.*—A lease of a farm provided that the tenant was to have and hold said premises for one year from April 1st, 1867, and to have the privilege of said farm two or three years, if the farm was for rent, if the tenant suited the landlord, and if they could agree on the rent. Without any other contract, the tenant continued in possession after the expiration of the first year, the landlord having told him in the fall of the second year, that he could not have the premises longer, that he, the landlord, wished to take possession himself in the spring.

Held, in a suit commenced by the landlord April 7th, 1869, for possession, that he was entitled to recover possession without having given any notice to quit.

APPEAL from the Laporte Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellant to recover possession of certain real estate. Trial; finding and judgment for the plaintiff. The case comes before us exclusively on the evidence.

On the trial, it was admitted that the plaintiff was the owner in fee of the premises in controversy. The defendant gave in evidence a lease executed by the plaintiff to him, dated March 27th, 1867, by which the plaintiff let to defendant the premises in controversy, on certain terms and conditions mentioned therein. The lease contains the following clause: "Said Whetstone is to have and to hold said premises for one year from the 1st day of April, 1867, and have the privilege of said farm two or three years, if said farm is for rent, if said Whetstone sues said Davis, and they can agree on said rent," &c. The defendant testified that he

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took possession of the premises under the lease; that there was no other bargain made between himself and the plaintiff respecting the lease of the premises; he supposed he was holding under the lease; there was nothing said between Davis and himself in the winter or spring of 1868, about his holding the farm another year; never had any notice from Davis to leave the premises, until some men came to take possession of the farm in the spring of 1869.

Davis thereupon testified as follows: "I made no other bargain with Whetstone about renting the premises. I told him, in the fall of 1868, that he could not have the premises any longer; that I wanted to take possession of the farm myself in the spring."

This is the substance of all the evidence. The suit was commenced on the 7th of April, 1869.

The counsel for the appellant insists that Whetstone, after the expiration of the first year, became a tenant from year to year, and, therefore, that his tenancy was not terminated when the suit was brought, no notice to quit having been given him; and counsel on both sides have discussed at length the legal effect of the clause of the lease above set out.

Without undertaking to give a full construction of the entire clause, we state the following propositions, that seem to us to be clear enough: first, that Whetstone had no absolute right to the premises, by the terms of the lease, for a longer period than the year specified; second, if the farm should not be for rent, or if Whetstone should not suit Davis, the latter would be under no obligation to extend or renew the term; third, the "two or three years," mentioned in the clause quoted, are not to be in addition to the yearly term created by the lease, but that year is to be considered as making a part of the two or three years; and the language employed contemplates distinct and separate terms of a year each, amounting in all to three terms, including the one made absolute by the lease.

With this interpretation of the lease, there are two views of the case under the evidence, either of which justifies the

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finding of the court, although the tenancy was not terminated by a notice to quit; for under either view no notice to quit was necessary.

It appears by the evidence, that after the expiration of the first year, Whetstone continued in the possession, and held, as he supposed, under the lease, and without any new arrangement between him and Davis; and if we are to infer from the evidence that Davis was consenting to Whetstone's continued possession, we also might infer that it was tacitly understood between them that a second yearly term was running; that the lease had been extended for another year by the mutual acquiescence and consent of the parties. Thus a new tenancy for another year, and not from year to year, was created, and Whetstone's right of possession terminated at the end of the second yearly term, without any notice to quit. Whetstone's continuance in possession after the expiration of the first year was, at most, notice to Davis of his election to continue for other year. *Falley v. Giles*, 29 Ind. 114. Of course, Davis was bound by his acquiescence in that possession for no greater length of time than another year.

Before the expiration of the second yearly term, Davis, according to his testimony, notified Whetstone that he could not have the place any longer; that he wanted to take possession himself in the spring. This, although not such a notice as is required to terminate a tenancy from year to year, was a notice to Whetstone that a condition of things would not exist that would enable him, by the terms of the lease, to claim an extension for another year. Without a renewal of the lease, or some new agreement, or some election by Whetstone to continue another year, consented to or acquiesced in by Davis, Whetstone's rights effectually terminated at the end of the second year.

What we have said is on the supposition that Davis consented to Whetstone's continued possession after the expiration of the first term. If Whetstone held on under the lease, and Davis consented thereto, and such consent is in no way

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explained, we think that there was an implied extension of the lease for another yearly term. But if, on the contrary, Davis did not consent (and this is the other view of the case), then Whetstone was a mere tenant at sufferance after the expiration of the first year, and notice to quit is not necessary to terminate such tenancy.

We are of opinion that the finding is fairly sustained by the evidence.

The judgment below is affirmed, with costs.

M. K. Farrand and *T. S. Cogley*, for appellant.

L. A. Cole and *E. L. Bennet*, for appellee.

RALSTON v. RADCLIFF.

PRACTICE.—County Commissioners.—Appeal.—Docketing Appeal.—Trial.—On an appeal by one to the circuit court from an order of the board of county commissioners allowing a claim filed by another before said board, the cause should be docketed in the circuit court in the names of the claimant and appellant, the former as plaintiff and the latter as defendant, and should be tried in the circuit court *de novo*; and if on the trial no evidence be offered, the appeal should not be dismissed, but the cause should be decided on the merits for the appellant.

APPEAL from the DeKalb Circuit Court.

DOWNEY, J.—Radcliff filed a claim before the commissioners of DeKalb county, which was allowed. Ralston, on affidavit and bond filed, appealed to the circuit court, from the order of allowance. In the circuit court the case appears to have been wrongly docketed as Samuel W. Ralston v. John F. Radcliff. A bill of exceptions, signed by the judge of the circuit court, shows that when the case was called for trial in that court, "Radcliff offered no evidence whatever, whereupon the said Ralston, by his attorney, announced that they would offer no evidence, and thereupon the court dismissed.

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the appeal, on the ground that the appellant had the burden of proof thrown upon him." Ralston excepted, and appealed to this court.

This ruling was wrong. The case should have been docketed in the circuit court as *Radcliff v. Ralston*, should have been tried *de novo*, and if no evidence was offered, should have been decided on the merits for Ralston, the appellant.

The judgment is reversed, with costs, and the cause remanded.

WORDEN, J., having been concerned as counsel in the cause, was absent.

J. L. Worden. J. Morris, and W. H. Withers, for appellant.

WHITE and Others v. GARRETSON and Another.

SUPREME COURT.—*Demurrer.—Amendment.*—Where, a demurrer to a paragraph of a reply having been sustained, the plaintiff, by leave of court, has amended said paragraph, and the cause has been tried with the amended paragraph as a part of the pleadings, no question can be raised in the Supreme Court upon the ruling on said demurrer.

SAME.—*Demurrer.—Withdrawal of Pleading.*—Where, a demurrer to a paragraph of an answer having been overruled, the defendant, by leave of court, has withdrawn said paragraph before trial, no question can be raised in the Supreme Court upon the ruling on said demurrer.

SAME.—*Assignment of Errors.—New Trial.*—Where the overruling of a motion for a new trial is not assigned as error, the Supreme Court will not consider any error in relation to giving or refusing to give instructions to the jury, or to propounding to the jury or withholding therefrom special interrogatories.

APPEAL from the Warren Circuit Court.

WORDEN, J.—This was a petition for partition by the appellants against the appellees and others. The appellees were made defendants on the ground that they claimed some interest in the land severally. They answered, setting up title in the appellee Ezekiel Garretson to a part of the land

sought to be parted. Issue was joined, and the cause as to appellees was tried separately from the other parties. Verdict and judgment for the appellees.

There are four errors assigned. The first is in sustaining the appellees' demurrer to the first paragraph of the appellants' reply; the second and third relate to giving and refusing instructions, and to propounding and withholding special interrogatories; the fourth is in overruling a demurrer to the third paragraph of the defendants' answer.

The record sets out the first paragraph of the appellants' reply, and shows, also, that a demurrer was sustained to it; but it further shows that after the demurrer was sustained, the appellants took leave to amend, and did amend it. The record speaks thus: "Come the parties by their attorneys, and the court grants the plaintiffs leave to amend the first and sixth paragraphs of their reply herein, and the plaintiffs now amend their reply herein by interlineation," &c. After this amendment no demurrer was filed to it. The reply set out in the transcript is, beyond doubt, the reply as amended by the interlineation; and, although the evidence is not in the record, the charges of the court and the interrogatories propounded to, and answered by, the jury indicate that the reply was regarded as part of the pleadings, and that the appellants had the full benefit of it as such. This disposes of the first assignment of error.

The fourth assignment stands upon no better foundation. The record shows that the court overruled a demurrer filed by the plaintiffs to the third paragraph of the defendants' answer; but it further shows that subsequently, and as the parties were about to enter upon the trial of the cause, the defendants, with the leave of the court, withdrew that paragraph.

The second and third assignments of error embrace such matters only as should have been made the foundation of a motion for a new trial. This was done, but no error is assigned on the overruling of the motion. In order to present the questions sought to be raised, it was necessary to have as-

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signed error on the overruling of the motion for a new trial. This was held at least three times by our immediate predecessors, and once by the bench as now constituted. *Whitinger v. Nelson*, 29 Ind. 441; *Herrick v. Bunting*, *id.* 467; *Smith v. Crigler*, *id.* 516; and *Tyner v. Adams* (*ante*, p. 401), at the present term of this court.

We find no error in the record for which the judgment ought to be reversed.

The judgment below is affirmed, with costs.

J. M. Butler, J. McCabe, B. F. Gregory, and J. Harper, for appellants.

Z. Baird and W. P. Rhodes, for appellees.

BARNES and Others v. SMITH.

PRACTICE.—Default.—Motion to Set Aside.—Rule of Court.—Judgment having been rendered by the court of common pleas against the defendant in a suit on a promissory note, he moved that the default be set aside, and that he be allowed to answer, on the ground (disclosed by his affidavit and that of his attorney) that the attorneys for the parties had agreed by parol, out of court, that there should be a judgment for the plaintiff, by default, but that it had been taken for a larger sum than that mentioned in said agreement. A rule of said court provided that admissions or agreements about the proceedings in a cause would not be enforced, or the time of the court be permitted to be used in discussing them, unless in writing, or made of record, or in presence of the court. *Held*, that under said rule and the statute, 2 G. & H. 328, sec. 772, there was no error in overruling said motion.

SAME.—Amendment.—Demand of Judgment.—In said cause, at or after said default, the complaint was amended so as to claim a larger sum as the amount of the judgment. The amount of the judgment taken was authorized by the terms of the note in suit. Motion by the defendant, which was overruled, to strike out the larger sum and restore the smaller, the defendant's attorney, in an affidavit filed by him in support of said motion, stating his belief that the alteration had been made without leave of court.

Held, that it was immaterial in the Supreme Court whether said amendment was made or not in the court below.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—Suit by the appellee against the appellants on a promissory note. Judgment by default. Motion by defendants to set aside the default, and to be allowed to answer. The ground of the motion, as disclosed by the affidavit of one of the defendants and that of the attorney for the defendants, was that the attorneys of the parties had agreed that there should be a judgment for the plaintiff, by default, but that the judgment had been taken for a larger sum than had been mentioned in the agreement. The agreement was by parol and made out of court. There was a rule of the court that “admissions or agreements about the proceedings in a cause will not be enforced, or the time of the court permitted to be used in discussing them, unless in writing, or made of record, or in presence of the court.”

This rule is sufficiently liberal, and perhaps goes beyond the statute, which provides that an attorney has authority, until discharged or superseded by another, to bind his client in an action or special proceeding, by his agreement, filed with the clerk, or entered upon the minutes of the court, *and not otherwise*. 2 G. & H. 328, sec. 772.

The common pleas could not give effect to the parol agreement made out of court without violating its own rule and at the same time disregarding the statute.

The complaint had been amended, at or after the time of the default, so as to claim five hundred dollars, instead of four hundred dollars, as the amount of the judgment. The defendants moved the court to strike out the five hundred dollars, where it had been inserted, and restore four hundred dollars. This motion was overruled. It was based on the affidavit of the counsel for the defendants stating his belief that the alteration had been made without leave of the court.

The amendment might have been made in the common pleas, and if it had not been there made would not have been any ground for reversal in this court *Webb v. Thompson*, 23 Ind. 428; *Numbers v. Bowser*, 29 Ind. 491.

Apple v. Atkinson.

The amount of the judgment was authorized by the terms of the promissory note on which the suit was brought.

The judgment is affirmed, with costs.

R. Denny, for appellants.

R. M. Goodwin, for appellee.

APPLE v. ATKINSON.

SUPREME COURT.—*Assignment of Errors*.—There being no error assigned, upon an appeal to the Supreme Court, for any ruling of the court below on any pleading, or for the refusal to grant a new trial, the judgment was affirmed.

SAME.—*Petition for Rehearing*.—A petition for a rehearing signed by a person not a party, without any designation, prefix, or addition, to indicate that he is an attorney for a party, is not entitled to consideration by the Supreme Court.

APPEAL from the Marion Civil Circuit Court.

PETTIT, C. J.—There is no error assigned for any ruling of the court below on any pleading, nor for the refusal of the court to grant a new trial. We can, therefore, do nothing in the case but affirm the judgment, which is done at the costs of the appellant.

ON PETITION FOR A REHEARING.

PETTIT, C. J.—There is a paper filed in this case, purporting to be a petition for a rehearing, which is signed "Finch & Finch." These gentlemen are not parties to this suit, and they have not condescended, by any designation, prefix, or addition to their names, to inform us whether they are the attorneys of a party, or mere volunteers; if the latter, the petition is not entitled to consideration. But we have examined the paper as though it were properly signed, and

 Smith and Others *v.* Hollett.

find no good reason for granting a rehearing; and the petition is overruled.

F. M. Finch and *J. A. Finch*, for appellant.

S. Major, for appellee.

HILBORN *et al.* *v.* DIBBLE.

SUPREME COURT.—*Assignment of Errors.*

APPEAL from the Laporte Circuit Court.

PETTIT, C. J.—This appeal is dismissed for a non-compliance with the 18th (now 1st) rule of this court in the assignment of errors. *Brookover v. Forst*, 31 Ind. 255; and the case of *The State, ex rel. Childers, v. Delano*, ante, p. 52, decided at this term, and the authorities there cited.

J. A. Thornton, for appellants.

SMITH and Others *v.* HOLLETT.

CONTRACT.—*Construction.*—*Subscription of Donation to Railroad.*—Suit to recover a certain amount subscribed by the defendant as a donation to aid in the construction of a railroad, the contract of subscription on which the suit was brought, dated March 18th, 1865, providing that the subscribers thereto agreed to pay to A., or his assigns, the sums placed opposite their names, provided that A., or his assigns, should construct, or cause to be constructed, a railroad from Indianapolis to Danville, Illinois, by way of Brownsburg, Jamestown, Crawfordsville, and Covington, Indiana, to be located and established within one-fourth of a mile of Brownsburg, said sums to be paid when A., or his assigns, should have completed said railroad from Indianapolis to Crawfordsville, and should have regular trains of cars running through by way of Brownsburg. A. assigned said subscriptions to a certain railroad com-

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pany, May 16th, 1866, by a writing wherein he stated that, having abandoned the construction of said railroad, and having the written request of a large majority of the committee with whom he had been in negotiation in relation to said road, by whom said donations were placed in his hands, to assign the same to said railroad company, he, in pursuance of said request, for value received, assigned, &c., said subscriptions to said railroad company. In May, 1869, said subscriptions were assigned in writing by said company to the plaintiffs, who in their complaint alleged the foregoing, and that they, in pursuance of said contract, located, established, and constructed said railroad from Indianapolis to Crawfordsville, by way of Brownsburg and within one-fourth of a mile thereof, and by way of Jamestown, and were rapidly completing it from Crawfordsville to Danville, Illinois, by way of Covington, and since the 9th of May, 1869, had had regular trains of cars on said road from Indianapolis to Crawfordsville, of which defendant had notice, and that they as such assigns had performed all the stipulations of said contract, &c.

Held, on demurrer to said complaint, that it was not essential under said contract that said road should be constructed by A. only, but that his assignee could be substituted in the place of A. and by performance entitle himself to the sum subscribed.

Held, also, that the statement in the assignment of A., that he had abandoned the construction of the road, could not prevent a recovery by his assignee.

Held, also, that if the defendant's proposition to pay said sum might have been withdrawn before formal acceptance thereof or the construction of the road, yet as it was not withdrawn, and the work was completed as alleged, it was not necessary to allege such acceptance in the complaint.

Held, also, that no time for the completion of the road being specified, a reasonable time must be allowed, and that upon demurrer to the complaint it could not be held that there had been unreasonable delay.

APPEAL from the Hendricks Circuit Court.

DOWNEY, J.—This action was brought by the appellants against the appellee on the following writing:

“BROWNSBURG, Ind. March 18th, 1865.

“We, whose names are hereunto and herein subscribed, agree to pay to Henry C. Lord, or his assigns, the sums placed opposite our names, without any relief whatever from valuation or appraisement laws. Provided, that said Henry C. Lord, or assigns, shall construct, or cause to be constructed, a railroad from the city of Indianapolis, in the State of Indiana, to the town of Danville, in the State of Illinois, by the way of Brownsburg, Jamestown, Crawfordsville, and Covington, Indiana. And provided further, that the railway of said railroad shall be located and established within one-

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fourth of one mile of the town plat of the town of Brownsburg, State of Indiana; and it is expressly stipulated that said sums of money are to be paid when the said Henry C. Lord or assigns shall have completed said railroad from Indianapolis to the town of Crawfordsville, Indiana, and shall have regular trains of cars running through by the way of Brownsburg, in the State of Indiana. Witness our names.

J. HOLLETT - - - - \$100.00."

Which was assigned by said Lord, as follows:

"CINCINNATI, O., May 16th, 1866.

"Whereas I have received from the citizens along the line of a contemplated railroad from the city of Indianapolis, Indiana, by the way of Crawfordsville and Covington, to Danville, Illinois, subscriptions of donations to aid me in the construction of a railroad between the points aforesaid, and I having abandoned the construction of said railroad, and having the written request of a large majority of the committee with whom I have been in negotiation in relation to said road, and by whom said donations were placed in my hands, to assign the said donations to the Indianapolis, Crawfordsville, and Danville Railroad Company; now, therefore, in pursuance of said request, I, for value received, do hereby assign, transfer, and set over to said Indianapolis, Crawfordsville, and Danville Railroad Company all the said subscriptions of donations, without any recourse on me.

H. C. LORD."

And it is alleged that the said railroad company afterwards, on the — day of May, 1869, did assign, transfer, deliver, and pay over to the plaintiffs the said instrument in writing so executed by the said defendant, and that they are the legal and *bona fide* owners and holders thereof, which claim was transferred to said plaintiffs in pursuance of a contract in writing made between the said railroad company and the plaintiffs, by which the company, among other things, agreed to assign, transfer, and pay over the same to the plaintiffs.

And the plaintiffs allege that in pursuance of said contract

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they did locate, establish, and construct said railroad from said city of Indianapolis, by way of Brownsburg, and within one quarter of a mile of the town plat of the town of Brownsburg, and Jamestown, to the town of Crawfordsville, and they are pushing rapidly to completion said railroad from said town of Crawfordsville, by way of Covington, to the said town of Danville; that for a long time, to wit, from the — day of May, 1869, they have had regular trains of cars running on said railroad, so as aforesaid located, established, and constructed, from said city of Indianapolis to the said town of Crawfordsville, of which said defendant had notice; and they claim that as such assignees of said Lord and said railroad company they have performed all the conditions and stipulations in said instrument in writing, and are entitled to have and receive of and from said defendant the said sum of money therein specified; that the same is due and payable, but that the defendant has not paid the same, &c.; wherefore, &c.

There was a demurrer to the complaint, for the reason that the same did not state facts sufficient to constitute a cause of action, which was sustained; and there was a final judgment for the defendant. The plaintiffs appeal to this court, and have assigned for error the sustaining of said demurrer to the complaint.

The defendant must be held to the performance of this contract according to the intention of the parties thereto. This intention is to be discovered by a consideration of all its parts. If it had been intended that Lord only, could entitle himself to the promised sum of money by constructing the road, and that no one else could be substituted in his place, it would not have been said "that said sums of money are to be paid when the said Henry C. Lord *or his assigns* shall have completed said road from Indianapolis to the town of Crawfordsville," &c.; and then, in the body of the obligation the agreement is to pay to Henry C. Lord *or his assigns*. There is nothing in the substance of the transaction which indicates in any way that it was regarded as essential that Mr. Lord should construct the road. The ob-

ject seems to have been to secure the construction of the road upon the specified route, and when that was done, it seems to us that the defendant had got what he contracted for, and became liable to pay the amount which he had promised.

But it is insisted that the statement in the assignment of Mr. Lord, that he had abandoned the construction of the railroad, is an insuperable obstacle in the way of a recovery. We think not. It simply shows that the time had come, contemplated by the parties to the contract, when he might devolve upon "his assigns" the obligations and rights which he had assumed or was entitled to under the agreement.

Again, it is claimed that the subscription was, on the part of the defendant, only a proposition which, to be binding upon him, must have been accepted and made binding on the other party; that there can be no contract without a proposition on one part and the acceptance of it on the other. Conceding that the proposition or agreement to pay the amount named might have been withdrawn by the defendant, before there was a formal acceptance of it, or the work was constructed, which we do not decide, still it does not appear that there was any such withdrawal. For aught that appears, he stood by and allowed the work to go on to completion, without objection, knowing that those engaged in the work were relying on his promise for so much of their pay.

As no time was specified within which the railroad was to be constructed, the law, as in other cases, doubtless required it to be done in a reasonable time. But what would be a reasonable time in which to construct such a work may not be purely a question of law. It may depend on many facts and circumstances, and might be a proper question for a jury, under the direction of the court. We know that considerable time is generally required to secure the means necessary to justify the commencement of such a work, and also to construct the work after it has been commenced. We cannot say that in this case there was unreasonable delay.

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The judgment is reversed, with costs to the appellants; and the cause is remanded, with directions to overrule the demurrer to the complaint and require the defendant to plead thereto.

S. C. Willson, L. B. Willson, P. S. Kennedy, C. C. Nave, and C. A. Nave, for appellants.

L. M. Campbell, for appellee.

HANCOCK, Administrator, *v.* MORGAN and Another.

ADMINISTRATOR.—*Accord and Satisfaction*.—An administrator may receive in satisfaction of a note payable to him as administrator a claim, existing in account, of the maker against a third person; but the maker cannot be so released if there be no assignment of said claim to the administrator, and no agreement by said third person to pay the administrator, and said note be retained by the administrator.

APPEAL from the Washington Circuit Court.

DOWNEY, J.—The appellant sued the appellees on a promissory note payable to the plaintiff as administrator, before a justice of the peace. The defense set up was that the defendants had transferred to the plaintiff, in satisfaction of the note on which the suit was brought, a claim, or debt, due to them from one Beacham Hancock, and that the plaintiff had received the same in satisfaction.

There was a trial before the justice of the peace by jury and a verdict and judgment for the defendants. The plaintiff then appealed to the circuit court, where there was another trial by jury, with a similar result.

A motion for a new trial was made, for the following reasons: first, the court erred in overruling the plaintiff's demurrer to the first paragraph of the defendants' answer (?); second, in admitting evidence of the plaintiff having received from the defendants a debt due by William B. Hancock to

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John B. Morgan (defendant), in payment of the note sued on; third, in refusing instruction number one asked by the plaintiff; fourth, in instructing the jury that the plaintiff could recover the debt of William B. Hancock due John B. Morgan, in payment of the note sued on; fifth, the verdict is contrary to law; sixth, the verdict is contrary to the evidence.

This motion was overruled, and judgment was rendered on the verdict.

The plaintiff appeals to this court, and here assigns for error, first, overruling the demurrer to the first paragraph of the answer; second, admitting evidence of the receipt by the plaintiff from the defendants of the debt due from William B. Hancock to the defendant John B. Morgan, in payment of the note on which suit was brought; third, in refusing the first instruction asked; fourth, in giving instruction that the plaintiff could recover the debt due from William B. Hancock; fifth, in overruling the plaintiff's motion for a new trial.

With reference to the first alleged error, the record shows that a motion was made to strike out the first paragraph of the answer, and that it was overruled. There is a demurrer copied in the transcript, but there does not appear to have been any action of the court on it. Perhaps the demurrer is intended where the motion is mentioned.

The said paragraph of the answer is as follows: "Said defendants *files* this as *his* set-off, and pleads payment of said demand in full, and that said John Hancock, administrator of said estate, did take a debt on Beacham Hancock for the payment of said note, and said Beacham Hancock was indebted ninety dollars and twenty-one cents, and said it was paid to his satisfaction, and that said defendants could have their note at any time; was done in the fall of 1866."

Regarding this as setting up a satisfaction of the note on which the suit was brought, by the transfer of the debt or claim due to the defendants from Hancock, we think it was good, in substance, though certainly, not a very good specimen either of pleading or of grammar. But this is not

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a question of much practical importance in the case. The suit having been commenced before a justice of the peace, there was no necessity to plead payment or accord and satisfaction. 2 G. & H. 585, sec. 34.

The next objection is, that the court should not have received the evidence of the agreement on the part of the plaintiff to take the claim on William B. Hancock in satisfaction of the note on which the suit was brought. The ground of this objection was that the administrator had no legal right or power to make such an agreement, and could only receive money in payment of the debt due to him. This is the same point involved in the refusal of the court to give the first instruction asked by the plaintiff, which was, that an administrator cannot receive anything except money in payment of a debt due the estate of which he is administrator.

The court admitted the evidence, and on this point instructed the jury as follows: "It is true, as a general rule, that an administrator, upon the sale of his intestate's property, is not authorized to receive anything but money; but he cannot commit a fraud on his debtor, he cannot be permitted to take, in payment of a note, a claim on a good man, and then wait with it till that man becomes insolvent, and then say, I had no right to make any such agreement; that might work a fraud, because the other man might have collected his money before his debtor became insolvent. If the administrator lost the money by waiting on Beacham, then he must make it good to the estate," &c. There was an exception to the instruction given, and to the refusal to give that which was asked.

In *Chandler, Adm'r, v. Schoonover*, 14 Ind. 324, this court held, that, as a general rule, an administrator, upon a sale of the intestate's property, cannot receive in payment anything but money.

The court gave this to the jury as the law, but, by adding to it, authorized the jury to depart from the rule on the ground of supposed fraud on the part of the plaintiff.

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We see no evidence of fraud in the testimony. The parties stopped short of carrying their arrangement to the point where it would have become legally sufficient and binding. This was a matter as well known to one as to the other party. John Hancock had no right of action against William B. Hancock, and, consequently, an action against him would have resulted in nothing. It was not a fraud to fail to sue when there was no cause of action. Had there been an assignment of the claim on William B. Hancock, there might have been a different case presented.

The motion for new trial on account of the insufficiency of the evidence has induced us to examine the evidence, which is all in the record, with some degree of care.

The plaintiff gave in evidence the note on which the suit was brought, and then rested.

The defendants then gave the following evidence:

John B. Morgan, one of the defendants, testified that the plaintiff came to him, and demanded payment of the note sued on, and said that the note was due on that day; that defendant said he could not pay it until he had settled with William B. Hancock, that William B. Hancock owed the defendant for hogs. Plaintiff said it would suit him to take William B. Hancock for the debt and credit the note sued on for the amount, and he would take William B. Hancock for the debt. Defendant afterwards had a conversation with plaintiff, in which he said that he had seen William B. Hancock, and he had agreed to it, and that he had forgotten to bring the note sued on. About four months afterwards, had another conversation with the plaintiff, in which he said he had forgotten to bring the note; several times afterwards plaintiff promised to give him up the note. After plaintiff had heard that William B. Hancock was broken, he promised to give up the note when William B. Hancock and plaintiff got the thing fixed up. This trade was made in the fall, before William B. Hancock returned. Four days after William B. Hancock returned, plaintiff asked defendant to pay the note, and said that William B. Hancock was broken.

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Defendant said, that was a horse of another color, and he would think about it. The next time he saw the plaintiff, he told him that he would not pay the note, that he had already paid it once. Afterwards plaintiff asked him for it, and said he knew he had taken William B. Hancock for it, but William B. Hancock had broken, and he, plaintiff, could not afford to lose it. William B. Hancock, at the time the note became due, owed defendant between three and four hundred dollars, and witness stated the particulars of such indebtedness. He made no written assignment or transfer to the plaintiff of the claim on William B. Hancock, and plaintiff did not deliver to him the note which he held on the defendants. He offered to give to the plaintiff a written order on William B. Hancock, but he said it was not necessary. The note sued on was given for property purchased at the administrator's sale of the goods of the deceased; and William B. Hancock had not paid him the amount which was due to the witness from him as above.

Amos Davis. Heard a conversation between the plaintiff and the defendant, and plaintiff agreed to take William B. Hancock for the debt due by defendant to the plaintiff, and defendant agreed to it.

William Morgan. Heard a conversation between the plaintiff and the defendant; the plaintiff said he had agreed to take William B. Hancock for the debt in dispute, but that William B. Hancock had broke, and now he wanted defendant to pay him. Defendant said he had paid William B. Hancock to pay this debt, and that he would not do so.

Samuel B. McCreary. John B. Morgan paid him two hundred and fifty dollars, of William B. Hancock's money, in 1866.

The defendants then rested. The plaintiff then testified, in his own behalf, that the note in suit was given to him for property sold by him as administrator of Henry Rafferty, deceased. He called on the defendant to pay the note, and the defendant told him to call on William B. Hancock, and he would pay it. Plaintiff called on William B. Hancock, and

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he refused to pay it, and said that he did owe Morgan a little on some hogs, but that Morgan owed him more on other debts, and that he could not pay it until he settled with Morgan; that he, witness, never promised to give the defendant up the note sued on; that he did not have the other conversations spoken of by defendants' witnesses; that in the spring after William B. Hancock broke, he demanded payment of the defendants, and the defendants promised twice to pay it by the first of August.

William B. Hancock. Plaintiff came to him to pay a note which he held on John B. Morgan, the defendant. He refused to pay, because he did not owe Morgan anything. There had been no settlement between him and Morgan at that time. Morgan owed him eighty dollars and twenty dollars, after giving him all the credits to which he was entitled. He had a note for eighty dollars on Morgan, which was due, and is not yet paid, and twenty dollars other indebtedness. He sent two hundred and fifty dollars by Morgan to McCreary.

Borden. Testified that the defendant said on the trial of this cause before the justice of the peace, that he had said to plaintiff that he could pay the note, but not that he would pay it.

This was all the evidence in the cause.

It is at once apparent from the evidence in this case that if it was necessary to show the assent of William B. Hancock to the arrangement by which it is alleged the note in suit was satisfied, the defense was not made out. There is no evidence of that fact on the part of the defendants, except that Morgan testifies that the plaintiff told him, "that he had seen William B. Hancock, and that William B. Hancock had agreed to it."

In opposition to this, is the testimony of the plaintiff, and also of William B. Hancock, that William B. did not assent to it, but, on the contrary, denied any indebtedness on his part to Morgan. When it is remembered that the only evi-

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dence on this point in behalf of the defendants was what was claimed by the defendant as having been admitted to him by the plaintiff, and that this kind of evidence is to be received with caution, and when it is seen that two witnesses testify to the contrary, we cannot doubt.

On this point the court charged the jury as follows: "If Beacham owed Morgan more than the amount of the note, and the administrator thought Beacham was better than Morgan, and chose to give up to Morgan the note, or agree to give it up to him, and take the account on Beacham in full satisfaction of the note, I think he had a right to do it, and that after Beacham *had agreed* to the transaction, the plaintiff could not then, after Beacham became insolvent, claim that the note was still in force against Morgan. By such an agreement, *assented to by Beacham*, then Beacham would become the debtor of his father to the amount of the note, and Morgan would have no more claim on Beacham, in consideration that the claim on Beacham was taken in payment of the note if Morgan would give up his claim on Beacham. I therefore charge the jury that if they find by the proof that such a trade was made as I have just been stating, that amounts to a payment and satisfaction of the note."

As the court told the jury, it required the assent of all the parties to give effect to the arrangement, to make it valid as a novation. As William B. Hancock never consented, and therefore never became liable or bound to pay the amount to John Hancock, the plaintiff, and as there was no assignment of the claim to W. B. Hancock, there was no consideration for any agreement on the part of John Hancock to surrender up the note on which the action is brought. The transaction bears upon its very face evidence of incompleteness. The note in suit was still retained by the payee, and William B. Hancock never, in any way, became bound to the plaintiff. There was, therefore, no valid and binding novation, and no defense to the action. See *Morris v. Whitmore*, 27 Ind. 418; 2 Parsons Con. 187-8.

The Toledo, Wabash, and Western Railway Co. v. McNulty.

The judgment is reversed, with costs to the appellant, and the cause remanded, with directions to grant a new trial.

T. L. Collins and *J. S. Butler*, for appellant.

THE TOLEDO, WABASH, AND WESTERN RAILWAY COMPANY v.
McNULTY.

JURISDICTION.—*Justice of the Peace.*—*Collateral Proceeding.*—*Pleading.*—

Evidence.—Where the judgment of a justice of the peace of another state is relied upon as a cause of action or as a ground of defense, it must be alleged, generally, that the judgment or decision was duly given or made, as authorized by section 83 of the code, or the facts showing the jurisdiction and authority must be specially set forth; and in either case, where the allegation of jurisdiction is denied, the facts which authorized the exercise of jurisdiction must be proved.

SAME.—*Copy of Judgment.*—*Demurrer.*—Where a judgment is relied upon as a cause of action or as a ground of defense, and a copy of the judgment filed with the pleading in which it so relied upon shows upon its face that the judgment is invalid, a demurrer to the pleading is properly sustained, unless the allegations of the pleading would warrant the introduction of extrinsic evidence which would render the judgment valid.

SAME.—*Justice of the Peace.*—A justice of the peace has no common law jurisdiction in civil cases; his powers in that regard are statutory.

SAME.—*Garnishment.*—Suit for work and labor. Answer, that the defendant had been adjudged to pay a part of the amount of the plaintiff's claim, as garnishee, at the suit of a third person, before a justice of the peace of another state named, the defendant offering to confess judgment for the residue of the plaintiff's claim. The transcript of the proceeding before said justice and certain statutes of said state were filed with the answer, from which it did not appear that there was any notice to the defendant in the principal action before said justice; but it appeared that the money was paid voluntarily, before judgment against the principal defendant, and upon an insufficient affidavit against the garnishee.

Held, that the answer was bad on demurrer.

APPEAL from the Allen Common Pleas.

DOWNEY, J.—This was a suit by McNulty against the railway company for work and labor.

The company answered, first, the general denial; second,

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that they had been garnished, at the suit of one John Harris, before a justice of the peace, at Toledo, in the State of Ohio, and adjudged to pay a part of the amount which had been due to the plaintiff in this suit, in payment of a claim of said Harris. They make the proceedings before the justice of the peace of Toledo, and certain sections of the statutes of Ohio on the subject, part of the second paragraph of their answer. The company offered to confess judgment for the residue of the plaintiff's claim and costs.

A demurrer to the second paragraph of the answer was sustained, and there was an exception taken. Case tried by the court, and judgment for the full amount of the plaintiff's claim.

Several errors are assigned, but the only one properly presented relates to the action of the court in sustaining the demurrer to the second paragraph of the answer.

Where the judgment of a justice of the peace of another state is relied upon as a cause of action, or as ground of defense, it must be alleged, generally, that the judgment or decision was duly given or made, as authorized by sec. 83, 2 G. & H. 107, or the facts showing the jurisdiction and authority must be specially set forth. *Willey v. Strickland*, 8 Ind. 453.

In either case, where the allegation of jurisdiction is denied, the facts must be shown, which authorized the exercise of jurisdiction. 2 G. & H. 107, sec. 83.

In alleging a judgment as a cause of action, or as ground of defense, the rule established by this court requires a copy of the judgment to be filed with the pleading in which it is asserted. *Ringle v. Weston*, 23 Ind. 588, and cases there cited.

Where a copy of the record is thus filed with the pleading, and it shows, upon its face, that it is invalid, a demurrer to the pleading is properly sustained, unless the allegations of the pleading would warrant the introduction of extrinsic evidence which, being adduced, would render the judgment valid.

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A justice of the peace has no common law jurisdiction in civil cases. His powers in that regard are statutory. He can act only in those cases, and in that manner, authorized by statute. *Willey v. Strickland, supra.*

The copy of the judgment filed with the answer in this case fails to show any notice to the defendant in the principal action. As the court of a justice of the peace is a court of limited jurisdiction, the presumption which is indulged with reference to the judgments of courts of general jurisdiction cannot apply.

That part of the transcript of the justice of the peace relating to notice to the defendant is as follows: "April 12th, 1866, case called, plaintiff present, defendant absent. Whereupon, cause was continued to the 24th day of May, A. D. 1866, for publication and appearance of defendant." "May 24th, 1866, cause called, plaintiff present, defendant absent, trial had," &c.

We must presume that the statute of Ohio does not authorize the rendition of judgment against a party, even though a non-resident, without some notice to him. That notice was given ought, in a proceeding before a justice of the peace, affirmatively to appear. *Cone v. Cotton*, 2 Blackf. 82.

A section of the statute of Ohio, set out in the answer, provides, that the garnishee "may pay the money owing to the defendant by him, to the constable having the order of attachment or into the court. He shall be discharged from liability to the defendant, for any money so paid, not exceeding the plaintiff's claim." And it appears from the transcript that the railroad company paid the amount necessary to satisfy the plaintiff's claim and the costs, before any judgment was rendered against the defendant.

This was not a compulsory payment. It was not made in consequence of any judgment rendered. It was optional with the railroad company. She was not bound to pay until there was a judgment against the defendant, and also a judgment against her as garnishee requiring the payment to be made.

 Wallace v. Cravens.

The affidavit required by the Ohio statute in case of garnishment is not set out in the transcript. There is only the statement of the justice of the peace in the transcript as to what it was, and this statement does not show that it contained all that the Ohio statute requires. The statute requires that the affidavit shall show that the garnishee is "within the county where the action is brought." Nothing appears on this point in what is said about the affidavit. Mr. Drake, in his work on attachment, after referring to the cases, says: "It follows hence, that a garnishee must, for his own protection, inquire, first, whether the court has jurisdiction of the defendant, and next, whether it has jurisdiction of himself. If the jurisdiction exists as to both, he has no concern as to the eventual protection which the judgment of the court will afford him; it will be complete." Sec. 695.

This money was paid voluntarily, when the justice of the peace had obtained no jurisdiction by giving any notice to the defendant, and upon an insufficient affidavit against the garnishee.

We think the demurrer to the second paragraph of the answer was correctly sustained.

The judgment is affirmed, with costs.

W. Z. Stuart, for appellant.

W. Leach, for appellee.

 WALLACE v. CRAVENS.

84	534
157	98
84	534
158	542

EVIDENCE.—State Courts.—Acts of Congress.—The Congress of the United States cannot control the rights of parties in the introduction or the weight of evidence in a state court, against the laws of a state, in a case arising purely under the laws of the state and properly before such court.

SAME.—U. S. Revenue Stamp.—The want of a United States revenue stamp upon an assignment of a title-bond cannot render such assignment inadmissible in evidence in a state court.

Wallace v. Cravens.

HARMLESS ERROR.—*Instruction to Jury.*—A judgment will not be reversed because of an erroneous instruction to the jury, where it is clear that such instruction has done no injury.

APPEAL from the Ripley Circuit Court.

PETTIT C. J.—The appellee brought suit against the appellant to recover the possession of a lot in the town of Osgood in said county, and damages for the detention of the same. The complaint was in the usual and regular form. Answer of general denial. Trial by jury; verdict and judgment for appellee for possession and fifty dollars damages; and appeal to this court.

The alleged errors relied upon for a reversal are, the giving the instructions by the court, the overruling a motion for a new trial, and as incidental to the latter, the allowing the appellee to stamp and read in evidence an assignment of a title bond for the lot.

We will dispose of the last objection first. The plaintiff below produced an assignment of a title-bond as evidence, but it was objected to because it had not a United States stamp on it; thereupon the plaintiff asked leave to stamp the assignment, which was allowed by the court, and the assignment read in evidence over the objection and exception of the defendant. There was no necessity for the plaintiff to read the title-bond or its assignment to establish his right to recover; but if it had been necessary, the court committed no error in allowing the stamp to be placed on the assignment, and allowing it thereafter to be read in evidence. The Congress of the United States cannot control the rights of parties in the introduction or the weight of evidence in a state court, in a case which arises purely under the laws of the state, and is properly before such court, against the laws of the state; though it may be possible the party failing to apply the proper stamp may be liable to a fine or penalty in the federal courts (though we do not admit it). *Carpenter v. Snelling*, 97 Mass. 452. All decisions of this court in conflict with this opinion are overruled. The laws of this State require no stamps, and the assignment was properly admis-

Wallace v. Cravens.

sible in evidence, on proof of execution, without a stamp. A contract valid by the laws of this State cannot be rendered invalid in the State courts by an act of Congress.

The evidence was, in substance, as follows:

One Cochran acquired title to the land, August 7th, 1852, and owned it till November 3d, 1866, when he deeded it to appellee. May 1st, 1865, Cochran made a title-bond for the lot to appellant, for a deed, May 1st, 1866, or as soon as appellant should pay his note for one hundred and twenty-five dollars given for the lot. Appellant took immediate possession of the lot, though nothing was said in the bond or otherwise about his doing so. The bond was read in evidence, and assigned to appellee September 1st, 1865, at which time appellant was in, and appellee demanded possession. The assignment of the bond was read, as also appellee's deed, dated as above. And a written statement made by appellant to appellee, dated March 14th, 1867, stating that appellant had rented the lot of appellee, and agreed to quit the possession May 15th, 1867, and leave the premises in good condition, was read in evidence. Wm. Duncan testified, that in March, 1867, the appellant told him that he had sold out his property to appellee, and had agreed to give possession May 15th, 1867. Appellant took possession, as this witness says, in May, 1865. The evidence shows that while appellant was in possession he built a small house and made some other improvements, and that the property was worth six hundred dollars; that the appellee paid the appellant more than that amount; that appellee had several times demanded possession of appellant, before suit was brought, and after he became the owner of the property. The appellant's deposition was taken in Cincinnati, Ohio, and in it he says that he took possession of the lot in March, 1865, but denies that he ever had or saw a bond for the lot, or that he ever assigned such a bond, or that possession was ever demanded. Says that his wife paid fifty dollars on the lot, and paid for the fence, and that he can neither read nor write.

The instructions given by the court are as follows, all of which were excepted to by the appellant.

"1. It is conceded in this case that George W. Cochran was the owner of the lot in fee simple. The plaintiff is claiming title through him. He claims that Cochran sold the property to the defendant, and executed a title-bond to him for the same, conditioned for its conveyance upon the payment of purchase-money; that defendant assigned this title-bond to him and, pursuant to such assignment, the property was conveyed to him by Cochran.

"2. The defendant claims that this deed from Cochran to the plaintiff is void for champerty. He insists that at the time it was executed his wife was in possession of the premises, under a contract of purchase with Cochran. But if the evidence has proved that she had made such a contract, and that at the time of the conveyance to the plaintiff that contract was still executory, this deed of Cochran to the plaintiff would not be void for that reason, but would be a valid deed, and would convey to the plaintiff the legal title to the premises.

"3. The defendant is not claiming that he has the legal title, and if the plaintiff has shown a valid deed to this lot, he has made a *prima facie* case, showing that he is entitled to the possession of it.

"4. If at the commencement of this suit, the defendant was in possession of the premises, and before it was commenced the plaintiff demanded possession, the proof of these facts would, in the absence of proof of a paramount right to possession, entitle the plaintiff to recover in this suit.

"5. You will bear in mind that in this suit no equities of the wife of defendant in this property, as between her and Cochran or the plaintiff, can be adjusted or settled. If she has any equities in this property by reason of having paid purchase-money out of her own separate estate, such equities are not affected by this action. As before said, it is a question as between plaintiff and defendant, and if the plaintiff has proved that he was the holder of the legal title to this

Vancleve, Administrator, v. Boler.

lot, that defendant was in possession when the suit was commenced, or that he demanded possession before he brought his suit, he would be entitled to recover, in the absence of any evidence by the defendant that his possession was lawful.

"6. If after the suit was commenced, the plaintiff leased the lot to defendant, and the latter agreed, by this lease, to deliver up the possession on a particular day, if he failed on that day to deliver up the possession, the defendant would be entitled to recover upon the original demand made by him before the suit was brought."

We are of the opinion that these instructions, taken together with reference to the evidence, were not erroneous; but, however this may be, the evidence is so clearly and conclusively with the plaintiff below, that they could not have done, and did not do, any injury to the defendant below.

The jury found as they were bound to do from the evidence.

The judgment is affirmed, at the costs of appellant.

E. P. Ferris and H. T. Lipperd, for appellant.

W. D. Ward, J. O. Cravens, and J. R. Troxell, for appellee.

VANCLEVE, Administrator, v. BOLER.

SUPREME COURT.—*Assignment of Errors.—Names of Parties.—Rule of Court.*

Where on appeal to the Supreme Court, the assignment of errors does not state the names of the parties, the appeal will be dismissed.

APPEAL from the Blackford Circuit Court.

WORDEN, J.—The assignment of errors in this cause does not state the name of either of the parties. In short, there is no assignment of errors in this cause. The rule requiring the assignment of errors to state the names of all the parties has been long in force. Here there is no statement

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whatever of the names of the parties or either of them. The assignment of error is the commencement of the suit in this court, and it is quite as essential that the names of the parties should appear in the assignment of error as in the complaint in an action in the courts below.

The appeal is dismissed, at the costs of the appellant.

W. A. Bonham, for appellant.

J. Brownlee and *H. Brownlee*, for appellee.

SANFORD v. SINTON and Another.

SUPREME COURT.—*Transcript.—Clerk's Certificate.*—Where, on appeal to the Supreme Court, the certificate and seal of the clerk of the court below are wanting to the transcript, the appeal will be dismissed.

84	539
154	48

APPEAL from the Elkhart Circuit Court.

PETTIT, C. J.—This case is dismissed for want of the certificate and seal of the clerk of said court. 2 G. & H, 273, sec. 558; *Vanliew v. The State*, 10 Ind. 384; *Hinton v. Brown*, 1 Blackf. 429.

Dismissed, at the costs of the appellant.

WORDEN, J., having been of counsel, was absent.

J. Bradley, *W. A. Woods*, and *J. D. Arnold*, for appellant.

J. L. Worden, *J. Morris*, *A. Ellison*, *A. S. Blake*, and *R. M. Johnson*, for appellees.

Mullen v. The State.

MULLEN v. THE STATE.

CRIMINAL COURTS.—*Constitutional Law.*—Section 7 of the act creating the twenty-fourth judicial circuit (Acts 1869, Reg. Sess. 14) and section 6 of the act creating the twenty-seventh judicial circuit (Acts 1869, Spec. Sess. 48) are invalid, the subject-matter thereof not being expressed in the titles of the acts of which they are parts.

SAME.—*Of Jefferson County.*—*Act Abolishing.*—The act of 1871 abolishing the Jefferson Criminal Circuit Court is valid; and said court had no power, after the taking effect of said act, to rule upon a motion in arrest of judgment, or to render judgment in a cause pending before it.

APPEAL from the Jefferson Criminal Circuit Court.

DOWNEY, J.—This was a prosecution against the appellant, in the criminal court, on appeal from a justice of the peace, for provoking an assault and battery. There was a trial by the court without a jury, and the defendant was found guilty. Motion for a new trial overruled, on the 16th of February, 1871, and motion in arrest of judgment.

A bill of exceptions copied into the record, signed by the judge, says, that on the 2d day of March, 1871, the prosecuting attorney and the defendant appeared in said court, and the defendant objected to the court proceeding in the cause, for the reason that the law had been repealed by which the court had been organized and held, which objection the court overruled; that the defendant then moved for his discharge, which motion was also overruled by the court. The prosecuting attorney then moved to take up the defendant's motion in arrest of judgment, to which the defendant objected, which objection was also overruled. The defendant then objected to the rendition of judgment against him, which objection was disregarded, and judgment rendered against him. To all of these rulings of the court the defendant excepted separately and specifically as the rulings were made.

Prior to the 2d of March, 1871, the act entitled "an act to abolish the twenty-ninth judicial circuit, Jefferson Criminal Circuit Court, and to transfer its business to the circuit court,

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to provide for the jurisdiction of the circuit and common pleas courts of Jefferson county in cases of felony and misdemeanor and matters connected therewith," had taken effect, if it ever did take effect. That act was filed in the office of the Secretary of State on the 18th day of February, 1871, without the approval of the Governor.

We are thus required to pass upon the validity of that act, and to say whether it is, or is not, constitutional. If it is valid, then the Jefferson Criminal Circuit Court was abolished before the action of the court above referred to took place; but if it is not valid, then the judgment of the court should be affirmed. It is not necessary that we should set out the act in question, as its title sufficiently indicates what it is.

The first and principal question with reference to the validity of the law is whether it is local or special. It is claimed that the criminal circuit courts are organized under a general law, and that to repeal it as to Jefferson county only, is to repeal the law as to all such courts, by destroying the uniformity of the act; or if this is not the case, that then the law in question is unconstitutional because it is local or special.

The first act referred to is the following clause of section 5 of the act of December 20th, 1865, Acts 1865, Spec. Sess. 151. "And the criminal circuit court shall be organized and held in all counties having ten thousand voters or more therein, which fact is to be ascertained by the Governor, and certified by him to the clerks of such counties. And in all counties in which the criminal circuit court is organized, the civil circuit court shall have no criminal jurisdiction, but shall have only the jurisdiction of the circuit court in civil cases."

This act was amended by the act of March 8th, 1867, section 1, Acts of 1867, p. 78, by reducing the required population from ten to seven thousand.

In the act of March 1st, 1869, entitled "an act creating the twenty-fourth judicial circuit, providing for the election of a judge thereof, and providing compensation therefor, declaring the jurisdiction of said courts, and providing for the

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transfer of actions thereto, and declaring an emergency," there is this section :

"Sec. 7. There may be organized, under the laws of the State, a criminal court in any county in the State having a voting population of six thousand votes or over, and all the provisions of section five shall be applicable to said court." Acts 1869, Reg. Sess. 14.

It can hardly be seriously contended that this act can have any bearing on the question which we are considering. Its title is confined to that part of the act relating exclusively to the organization of the court in Vigo county, which by the act is formed into the twenty-fourth judicial circuit.

In the act to create the twenty-seventh judicial circuit, with a title similar to that creating the twenty-fourth circuit, there is this section :

"Sec. 6. Criminal circuit courts shall be organized and held in all counties in which there may be an incorporated city, having a resident population of ten thousand inhabitants or more, without regard to the number of voters contained in such counties." Acts 1869, Sec. Sess. 48.

These are believed to be the only provisions of a general nature relating to the establishment of such courts.

While it must be conceded that the acts of 1865 and 1867, above set forth, are valid, it must at the same time be admitted that those of 1869 are invalid on account of defects in their titles.

But no criminal circuit court has ever been organized under these general provisions. Every criminal court in the State has been organized by a special act of the legislature. It has in each case been deemed necessary to pass an act specially providing for the organization of the court in each county where they exist, and providing where they shall sit, who shall be officers, the time of holding the same, declaring a vacancy in the office of judge and prosecutor, authorizing the governor to appoint them, &c. Without such special enactments or a general law authorizing the same things to be done, no such court could have been organized and set

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in motion. The act authorizing such a court in Jefferson county, and in Vanderburgh, approved May 13th, 1869 (1868 by mistake) brought the criminal circuit court into existence in those counties. Without this no such court would have existed in those counties.

We think the act in question, which repeals so much of said last named act as authorizes a criminal court in Jefferson county, is not liable to any objection which would not with equal force apply to the act creating the court. If one is invalid, the other must be also; and if one is valid, so is the other.

The judgment, back to and including the decision upon the motion in arrest of judgment, is reversed, and the cause remanded, to be certified immediately.

J. Roberts and *H. W. Harrington*, for appellant.

J. W. Lick, *N. B. Taylor*, and *B. W. Hanna*, Attorney General, for the State.

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CRIMINAL LAW.—*Indictment*.—*Assault with Felonious Intent*.—Since the taking effect of the act of December 2d, 1865 (3d Ind. Stat. 258), defining an assault, an indictment for an assault with intent to commit a felony must charge the assault by setting forth the facts constituting it according to said statutory definition.

SAME.—*Change of Venue*.—*Transcript*.—Where in a criminal cause taken by a change of venue from one circuit court to another, no transcript, or an insufficient transcript, of the proceedings in the former court has been filed in the latter court, and the defendant has moved the court, for that reason, to quash the proceeding and dismiss him, it is not error for the court to permit the prosecuting attorney, on his motion, to place such transcript on file.

SAME.—*Original Indictment*.—Upon a change of venue in a criminal case from one circuit court to another the transcript of the proceeding in the former court should show the transfer of the original indictment to the latter court.

APPEAL from the Pulaski Circuit Court.

34	543
141	112
34	543
145	278
84	543
157	575

Adell v. The State.

DOWNEY, J.—This was a prosecution for an alleged assault with intent to commit a rape, which originated in the Fulton Circuit Court, and, on application of the defendant for a change of venue, was transferred to the Pulaski Circuit Court.

There was a motion made by the defendant, in the Fulton Circuit Court, to quash the indictment, which was overruled, to which ruling the defendant excepted.

In the Pulaski Circuit Court the defendant moved the court to quash the proceeding and discharge him, because no transcript of the proceedings in the Fulton Circuit Court had been filed in that court. Whereupon the prosecuting attorney moved the court for leave to file such transcript, which motion was granted, the transcript filed, and the motion of the defendant overruled, to which he excepted.

There was then an arraignment, plea of not guilty, trial by jury, verdict of guilty, motion for a new trial overruled, and sentence pronounced against the defendant.

The defendant assigns as error, first, the overruling the motion to quash the indictment; second, the overruling the motion to discharge him on account of the insufficiency of the transcript; third, that the record does not show that he was indicted by a lawfully constituted grand jury, and that there is no record of the organization of the court.

The indictment is as follows:

“THE STATE OF INDIANA, } In the Fulton Circuit Court,
 vs. } August term, 1870.
 John B. Adell. }

The State of Indiana, county of Fulton, ss.

The grand jurors for the county of Fulton, upon their oath, present that John B. Adell, on the 2d day of March, 1870, at the county of Fulton and State of Indiana, did then and there feloniously, purposely, and unlawfully, make and perpetrate an assault in and upon one Mary Edgington, a woman, with the felonious intent to then and there forcibly ravish and have carnal knoweldge of said Mary Edgington, against her will, against the peace and dignity of the State

of Indiana, and contrary to the form of the statute in such case made and provided.

MICHAEL L. ESSICK,
Deputy Pros. Att'y."

The objection urged to the indictment is, that it does not charge the assault according to its legal definition. Prior to 1865, though it was well enough understood what constituted an assault according to the common law, we had in this State no statutory definition thereof. By an act of December 2d, 1865, 3 Ind. Stat. 258, the legislature declared, that "an assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another," &c. In every indictment for an aggravated assault or assault and battery, it is necessary to charge, in the appropriate terms, the minor offense, and then allege the particular felony which the accused intended to commit. If the minor offense is not properly charged, there is no foundation for an allegation of an intent to commit the higher crime. Is it enough for the pleader to say, as in this case, that the defendant did make and perpetrate an assault? Would it do to allege that an accused party did make and perpetrate an assault and battery upon a designated person? Must not the pleader set forth the facts which show that the accused is guilty of the imputed offense according to its legal definition? It may be that indictments similar in form to this may have been in use in this State prior to the enactment of the statute defining an assault. But since the legislature has furnished a definition of an assault, and thus placed it in the same category with other defined offenses, we must apply, in prosecutions for that offense, the same rule which is applied to prosecutions for other offenses; that is, that the offense must be described according to its statutory definition, by stating all the facts necessary to show that the act is in violation of the statute. A learned jurist of this State has, with reference to the statute of 1865, furnished the following precedent:

"The grand jurors for the county of Floyd, and State of Indiana, upon their oath present, that A. B., on the third day

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of August, A. D. 1864, at said county, did feloniously attempt to commit a violent injury upon the person of C. D., he, the said A. B., then and there having a present ability to commit said injury, by then and there feloniously, purposely, and with premeditated malice, shooting at and against the said C. D., with a certain gun, then and there loaded with gun powder and leaden shot, which the said A. B. then and there in both his hands had and held, with intent then and there and thereby, him, the said C. D., feloniously, purposely, and with premeditated malice, to kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana. E—— F——, Pros. Att'y."

Bicknell Crim. Prac. 479; *Malone v. The State*, 14 Ind. 219; *State v. Bougher*, 3 Blackf. 307.

The other alleged errors may be considered together. We think it was proper for the court to allow the prosecuting attorney to place on file the transcript, as was done. Bicknell Crim. Prac. 230. But this transcript was itself insufficient. It failed to show, nor does the record before us show, that the original indictment had been transferred to the Pulaski Circuit Court, or that it was there when the case was tried. Without this, that court had no jurisdiction to put the defendant on his trial. *Doty v. The State*, 7 Blackf. 427; *Sawyer v. The State*, 16 Ind. 93.

The judgment is reversed, the cause remanded, and the circuit court directed to sustain the motion to quash the indictment. The clerk of this court is directed to certify to the keeper of the state prison, who is directed to return the prisoner to the custody of the sheriff of Pulaski county.

W. H. Calkins, for appellant.

B. W. Hanna, Attorney General, and *M. L. Essick*, for the State.

BAKER v. WILLIAMS and Others.

DECEDENTS' ESTATES.—*Heir*.—A., who was a soldier, being at home on furlough, deposited \$175 with B., who thereupon executed a written instrument as follows: "Due" A. "\$175, which I am to pay him when called on, and in case of his death, I am to pay it to his sister," C., "or her guardian; and it is further agreed that I am not to pay any interest on the same, unless I should use it in my business; then I am to pay six per cent. for the time I use it, keeping an account of the length of time I use it;" dated, and signed by B. A. returned to the army, and there died, leaving said sister and a brother as his only heirs at law, and said sum was paid by B. to the guardian of C. *Held*, in a suit by said brother of A. against said sister and her guardian, to recover one-half of said sum, there having been no administration of the decedent's estate, and there being no debts against it, that the plaintiff was not entitled to recover.

APPEAL from the Morgan Circuit Court.

PETIT, C. J.—Thomas J. Baker, the appellant, sued William Williams, John Jackman, and Jane Jackman. The complaint was, in substance, that on the — day of —, 186—, one David A. Baker departed this life at —, leaving as his only heirs at law the plaintiff and defendant, Jane Jackman, late Jane Baker (intermarried with defendant John Jackman), who were brother and sister of deceased; that deceased left a claim due him from one Sweet of one hundred and seventy-five dollars, due April 10th, 1864, which claim is evidenced by a memorandum in writing, as follows, to wit: "Due David A. Baker one hundred and seventy-five dollars, which I am to pay him when called on, and in case of his death, I am to pay it to his sister, Jane Baker, or her guardian; and it is further agreed that I am not to pay any interest on the same, unless I should use it in my business; then I am to pay six per cent. for the time I use it, keeping an account of the length of time I use it.

"April 10th, 1864.

AUSTIN SWEET."

That on the — day of —, 186—, the defendant William Williams, then guardian of the defendant Jane Jackman, procured the said Austin Sweet to pay him said sum of one hundred and seventy-five dollars belonging to the heirs of

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said David A. Baker, deceased; that said defendant Williams now holds said sum of money, together with the interest thereon, and refuses to pay to the plaintiff, as one of the heirs of the deceased, his, plaintiff's, one undivided half of said money. Plaintiff further says, that there never was any administration upon the estate of said deceased, and that there are no debts against said estate. Prayer for judgment for one-half of the money.

To this the defendant answered, first, the general denial; second, that David A. Baker has departed this life, and that he left heirs surviving, the plaintiff and the defendant Jane, his brother and sister and only heirs at law, and that at the time of his death he gave and deposited with Austin Sweet the sum of one hundred and seventy-five dollars in cash, and said gift and deposit was evidenced by a certain writing, a copy of which is filed with the complaint. Said defendants further say, that at and prior to the time of the execution of the same, David A. Baker had been and was a soldier in the army of the United States, and as a part of the proceeds of his services as a soldier, he had in his possession and was the owner of said sum of one hundred and seventy-five dollars, and on returning to the army after an absence therefrom, he put said sum in the hands of said Sweet, upon the agreement and understanding with him, said Sweet, and with the declaration to said Sweet, that if he, said David A. Baker, should not return home alive and claim said money, he, Sweet, should deliver, and pay over said money to said Jane, said money to be her own money as a gift and donation to her from the said David A. Baker, declaring at the time he placed the money in the hands of said Sweet, that he intended his said sister to have the money, if he did not return from the army; and for the purpose of securing the said money to the said Jane, in the event of the death of him, the said David A. Baker, in her own right, as the absolute owner thereof in her own separate right, the said writing was executed; and accordingly, after the death of the said David A. Baker, the said Sweet paid over said money

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to said defendants; that it was not paid to them as the administrators of the estate of said deceased, nor did the said deceased intend that the defendants should administer on his estate. Wherefore the defendants pray judgment.

To the second paragraph of the answer there was a demurrer for want of sufficient facts, &c., which was overruled, and exception was taken, and this ruling is assigned for error, and presents the only question before us in the case.

A soldier was at home on a furlough, and was about to return to the ranks of his country's armies, where death was quite as likely as life; he had one hundred and seventy-five dollars, and an adult brother, and an infant sister, and with a brother's love for her glowing in his breast, he went to his trusty friend, and said, here is all I have; I am called to the post of honor, but of danger; if I return, give it again to me, but if I die, give it to my infant sister or her guardian. The writing was made accordingly. The soldier died, and the money was paid to his infant sister according to the contract, and we cannot and will not disturb its possession. We hold that the written memorandum was an obligation to pay the money to the soldier if he lived to demand it, but if not, to pay it to his sister. The soldier died, and the money has been paid to his infant sister, and no ruthless hand should be allowed to disturb that sacred memorial of a brother's love.

The demurrer should have been sustained to the complaint; for the written memorandum given by Sweet shows that no one had any legal interest in the money but the soldier and his infant sister, for whom he was so mindful and careful to provide. Law and equity alike require that the money shall remain where it is.

The judgment is affirmed, at the costs of the appellant.

A. Ennis, for appellant.

Roberts v. Smith.

ROBERTS v. SMITH.

34	550
135	610

34	550
139	592

34	550
140	349

34	550
148	620

SPECIAL FINDING.—Signing.—Bill of Exceptions.—Where a special finding under section 341 of the code is not signed by the judge or incorporated in a bill of exceptions, the Supreme Court will not review the decision of the court therein on the questions of law involved in the trial, or consider any question with reference to the sufficiency or insufficiency of such special finding to justify the judgment rendered by the court.

SAME.—Motion for New Trial.—Where such special finding is in accordance with the statute, the proper method of presenting to the Supreme Court the question of the sufficiency of the finding to justify the judgment is by exception to the decision of the court in its conclusions of law, and not by a motion for a new trial.

NEW TRIAL.—Evidence.—Where there has been no motion for a new trial on account of the insufficiency of the evidence, the Supreme Court will not review the action of the court below upon the facts.

APPEAL from the Franklin Circuit Court.

DOWNEY, J.—The appellee sued the appellant before a justice of the peace for work and labor. After judgment against the defendant before the justice of the peace, he appealed to the circuit court, where the case was, by agreement of the parties, tried by the court, without a jury. At the request of the defendant, the court made a special finding, and on that special finding rendered judgment for the plaintiff.

The special finding is not signed by the judge or incorporated in the bill of exceptions, and is not therefor such as to warrant us in reviewing his decision on the questions of law arising in the case. See *The Peoria, &c., Co. v. Walser*, 22 Ind. 73.

There was a motion for a new trial, for the following reasons: first, the judgment on the special finding of the court is contrary to law; second, the judgment of the court is contrary to the special finding of the court; third, the judgment of the court is not sustained by the special finding of the court.

As the special finding is not, as we have already seen, in any proper way before us, we cannot consider any question with reference to its sufficiency or insufficiency to justify the

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judgment which was rendered by the court. The proper way to present this question to this court, where the finding is in accordance with the statute, as construed by this court, is by exception to the decision of the court in its conclusions of law. *City of Logansport v. Wright*, 25 Ind. 512; *Peden's Adm'r v. King*, 30 Ind. 181.

The evidence given in the case is set out in a bill of exceptions, but there was no application for a new trial on account of the insufficiency of the evidence, without which we cannot review the action of the circuit court upon the facts. *Shurtz v. Woolsey*, 18 Ind. 435; *Gray v. Stiver*, 24 Ind. 174.

The judgment is affirmed, with costs.

T. B. Adams and *F. Berry*, for appellant.

H. C. Hanna, *C. Moorman*, and *F. S. Swift*, for appellee.

NATHAN WILLIAMS *v.* NATHANIEL ALLEN, Administrator of
CATHARINE HARR, deceased.

APPEAL from the Clay Common Pleas.

PETTIT, C. J.—There is no record, transcript, abstract, brief, or appeal bond, in this case, on file in this court or before us.

The transcript on which the above title is endorsed, and in which the appeal bond is found, and with which the abstract and briefs are placed, and the errors assigned in the above form, is a transcript in a case of Emanuel M. Harr, guardian of Catharine Harr, a person of unsound mind, *v.* Nathan Williams. In this last title there is no appeal taken, bond given, assignment of errors, abstract, or briefs filed.

The case is, therefore, dismissed, at the costs of the appellant.

S. Claypool, *G. P. Stone*, and *C. A. Knight*, for appellant.

D. E. Williamson and *A. Daggy*, for appellee.

Butt v. Gould.

BUTT v. GOULD.

ASSAULT AND BATTERY.—*Damages.—Mitigation*—In an action to recover damages for an assault and battery, it having appeared in evidence that the injury complained of was inflicted immediately after a dispute between the parties concerning certain rent, one claiming that it was due, the other insisting that it had been paid, and each impeaching the other's veracity, the defendant offered to prove, in mitigation, that what he had said about the rent was true, and that what the plaintiff had said was false.

Held, that the offered evidence was properly excluded.

APPEAL from the Miami Circuit Court.

DOWNEY, J.—This action was brought by the appellee against the appellant to recover damages for an assault and battery. There were issues formed; trial by jury; verdict and judgment for plaintiff; a motion for a new trial, made by the defendant, having been overruled.

There is but a single question in the case, and that relates to the exclusion from the jury of certain evidence offered by the defendant in mitigation.

The difficulty between the parties grew out of a dispute about some house rent, which Butt claimed was due, and which Gould insisted he had paid. Each party roughly impeached the veracity of the other; and immediately following this the defendant struck and beat the plaintiff, inflicting the injuries for which the action is brought.

The plaintiff and the defendant were each allowed to go fully into all that was done and said at the time of the commission of the assault and battery. The defendant then proposed to prove that what he asserted about the rent being due was the truth, and that what the plaintiff said about his having paid it was not true. This evidence the court rejected. The defendant reserved the question by exception, and this is the point for our decision.

Mr. Sedgwick, in his work on the Measure of Damages, p. 638, with reference to the proof of circumstances in mitigation of damages in cases of this kind, says, "The defendant cannot give in evidence, in mitigation of damages, the acts

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or declarations of the plaintiff at a different time, or any antecedent facts which are not fairly to be considered as part of one and the same transaction, though they may have been ever so irritating or provoking."

Prof. Greenleaf, after stating the rules with reference to the damages in such actions, says, at sec. 268, vol. 2, "It seems, therefore, that in the proof of damages, both parties must be confined to the principal transaction complained of, and to its attendant circumstances and natural results, for these alone are put in issue," &c.

We are referred by counsel for the appellant to the case of *Marker v. Miller*, 9 Md. 338. The case seems to favor the position of the appellant, but the same court in *Anderson v. Johnson*, 3 Har. & J. 162, decided the precise point involved here, the other way.

We think the evidence offered was properly excluded.

The judgment is affirmed, with five per cent. damages and costs.

N. O. Ross and *R. P. Effinger*, for appellant.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY *v.* BLACK.

SUPREME COURT.—*Weight of Evidence*.—The Supreme Court will not upon the weight of the evidence, consisting of the conflicting testimony of witnesses who testified in the presence of the court below, disturb the finding of the latter court.

APPEAL from the Dearborn Circuit Court.

PETTIT, C. J.—Appellee sued the appellant for the value of stock killed by her train of cars, where the road was not securely fenced. Proper issues were formed and tried by the court without a jury; finding and judgment for the plaintiff; motion for a new trial; the causes assigned are, "that

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the decision of the court is not sustained by sufficient evidence, and is contrary to law ;" overruled, and exception, and appeal to this court.

The overruling the motion for a new trial for the causes above stated is the only error assigned. The evidence is all in the record, and in some respects is strongly conflicting; but we think it fully sustains the action of the court below. In such a case, this court will not reverse a judgment; for the judge who tried the case, and saw and heard the witness, was much better qualified to appreciate the evidence, determine its weight and the credibility of the witnesses, than we are, who only see the evidence as it is written.

The judgment is affirmed, at the costs of appellant.

T. Gazlay, G. B. Fitch, and J. Schwartz, for appellant.

THE GREENCASTLE AND BOWLING GREEN TURNPIKE COMPANY and Others v. ALBIN and Others.

TURNPIKE.—*Act of 1867.—Duties of Assessors.—Injunction.*—Where assessors appointed under the act of March 11th, 1867 (Acts 1867, p. 167), providing for assessments on lands to aid in the construction of plank, &c., roads, did not list, assess, or appraise the benefits to *all* the lands within one mile and a half of the beginning and end of the proposed road as located; *Held*, that an injunction would lie to prevent the collection of assessments made by such assessors.

APPEAL from the Putnam Circuit Court.

PETTIT, C. J.—This suit was brought by the appellees, owners of lands, within one and a half miles of the road of the said company, against the company, and the auditor and treasurer of said county, praying an injunction against said company, auditor, and treasurer, from proceeding to collect the taxes, assessments, or benefits, assessed against the ap-

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pellees in favor of said company for the construction of said road.

There are many blunders in the record, and the clerk attempts to make it elegant and attractive by writing "and" up and down, instead of horizontally.

There is but one error assigned that we can notice, though there are seventeen in number (which will help the clerk of this court in costs), and that is the overruling the demurrer to the complaint. There was no error in this ruling, for the complaint was a good one in all respects.

There is but one paragraph in it, though the record shows that there was a demurrer to the first, second, third, fourth, and fifth paragraphs of it.

The transcript shows that a motion was made to make the bill of particulars more definite, yet there is *no* bill of particulars in the record, nor was this a case in which a bill of particulars was, or could be, required. The record is full of blunders and senseless jargon; instances are given above; but we find in it an agreed state of facts, in which it is admitted that the assessors or appraisers of benefits did not list, assess, or appraise the benefits to all the lands within a mile and a half of the beginning and end of the road as located.

This failure is fatal, as the court below properly held, whose ruling is approved and affirmed here, at the costs of the appellants. See, *Robbins v. Sand Creek Turnpike Co.*, at this term, *ante*, p. 461, and the authorities there cited.

R. Hathaway and *W. A. Brown*, for appellants.

S. Claypool, *J. A. Matson*, and *C. C. Matson*, for appellees.

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O'BRIEN v. PETERMAN.

JUDGMENT.—*Form of.—Supreme Court.*—When a judgment erroneously directs the sale of property without relief from valuation laws, an objection on this ground to the form of the judgment cannot be raised for the first time in the Supreme Court.

APPEAL from the Ripley Common Pleas.

DOWNEY, J.—Two errors are assigned in this case; first, that the complaint does not state facts sufficient to constitute a cause of action; second, that the court erred in directing the sale of the attached property without relief from valuation laws.

The first paragraph of the complaint is based on this agreement:

“January 18th, 1866.

“Article of agreement entered into between William O'Brien and John Peterman. The said William O'Brien agrees to get out, or cause to be got out, two hundred thousand good, merchantable whiskey barrel staves and heading to match them, the said staves and heading to be delivered at the town of Poston, between now and November next, and for the same the said Peterman is to furnish fourteen hundred dollars for the half of the profit over fourteen dollars per thousand. The said Peterman is to advance as follows: five hundred dollars down, and the balance along as the said O'Brien wants it, between now and the first day of August next; and further, the said Peterman has the selling of the staves any time within a year, when he thinks he can do the best with them.

WILLIAM O'BRIEN.

JOHN PETERMAN.”

It is alleged in the complaint by the plaintiff that he paid to the defendant on the contract the sum of fourteen hundred dollars, and that the defendant delivered him but fifty thousand staves, and that the defendant is indebted to him in the sum of seven hundred dollars, for money advanced

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and damages on said contract, for which he asks judgment. The suit was commenced on the 6th day of March, 1868.

We think this paragraph of the complaint was sufficient.

The second paragraph of the complaint is for personal property sold and delivered, and is in the usual form. We see no objection to it.

The form of the judgment was amendable in the common pleas, and no application to correct it, or any objection to it, appears to have been made in that court. The objection cannot be presented here for the first time. *Ebersole v. Redding*, 22 Ind. 232, and the cases there cited; *Watts v. Green*, 30 Ind. 98.

The judgment is affirmed, with five per cent. damages and costs.

O. P. Ferris and *H. T. Lipperd*, for appellant.

S. M. Jones, for appellee.

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Held, that the answer was bad on demurrer. *Kalbrier v. Leonard*...497

15. *Same.—Presumption.*—In such case it will be presumed that such street was legally laid out and opened, and that if the land-owner was damaged thereby, and claimed compensation, he received it.....*Ibid.*

16. *Same.—Tax.—Statute Construed.*—The provision of section 58 of the general act of 1867 for the incorporation of cities, "that no more than five acres of farming land shall be subject to taxation within such city," does not apply to assessments for improvements of streets and sidewalks. *Ibid.*

CONDONATION.

See DIVORCE, 2, 3.

CONSIDERATION

See CONTRACT, 9; PLEADING, 4, 7.

1. *Promissory Note.—Patent Right.*
Evidence.—Suit on a promissory note given by the defendant to the plaintiff in consideration of the assignment of a patent right to the former by the latter.

Held, that the fact that after the date of said note another patent for the same invention was issued to another patentee, could not be shown under an answer setting up want of consideration. *Crow v. Eichinger*.....65

2. *Pleading.—Evidence.*—An answer of entire want of consideration will fail if it appear on the trial that there was any consideration, however small..... *Ibid*.

3. *Assignment of Contingent Interest.*
A. gave his promissory note to B., in consideration of the assignment to the former by the latter of all his right, title, and interest in a contract between B. and C. and a life insurance company, by which B. and C. were to act as agents of said company in a designated territory, and for their services the company was to pay them a certain per cent. on all first premiums and a certain per cent. on all renewals collected by them on business secured by them or their agents. At the time of said assignment, B. claimed that there would be due him, under said contract, commissions on premiums yet to be collected.

Held, in a suit on said note, in which it was not shown that there was any fraud in the transaction, and it did not appear that A. had not obtained all the benefits that he expected from the assignment, that the assignment was a sufficient consideration for the note. *Greene et al. v. Bartholomew*.....235

CONSTITUTIONAL LAW.

See CITY, 9; CRIMINAL COURT, 1, 2; DUNKARD, 1; RAILROAD, 2 to 6.

1. *Legislative Power.*—When the constitution of a state vests in the General Assembly all legislative power, as does ours (article 5, section 1), it is to be construed as a general grant of power, and as authorizing such legislature to pass any law within the ordinary functions of legislation, if not delegated to the federal government or prohibited by the state con-

stitution. *The Lafayette, &c., R. R. Co. et al. v. Geiger*.....185

2. *Construction.—Constitutions and Statutes.*—Constitutions are to receive a strict construction, and acts of the legislature are to be liberally construed.....*Ibid*.

3. *Same.—“Incorporated Company.”*
The words “incorporated company,” in section 6 of article 10 of the constitution of this State, refer to those associations which are created for public benefit, and to which the government delegates a portion of its sovereign power, to be exercised for public utility,—such as turnpike, bridge, canal, and railroad companies.....*Ibid*.

CONTINUANCE.

See WITNESS, 1.

CONTRACT.

See CONSIDERATION; CUSTOM; DAMAGES; DRUNKARD, 2; MINOR, 3, 4; PRINCIPAL AND SURETY, 6; RAILROAD, 11; RESCISSION; SALE; SUNDAY; UNSOUND MIND.

1. *Separate Instruments of Different Dates.*—Suit on a bond conditioned in the alternative, that the principal obligor should, on a certain day, pay the plaintiff a certain sum, or in lieu thereof, at his own election, secure to the plaintiff on that day a clear title and the possession of certain real estate. Answer, setting up a written agreement alleged to have been made at the time of the making of the contract mentioned in the complaint and as a part thereof, but bearing a different date, whereby the plaintiff agreed that he would, on, &c., being the day fixed in said bond for the performance of the condition thereof, convey a certain farm to said principal obligor, the answer alleging that the plaintiff had failed and refused to so convey said farm, &c.

Held, that upon demurrer to said answer, the instrument therein set out should, notwithstanding the expressed date thereof, be regarded as having been executed at the same time that said bond was executed, and be considered as a part of the same contract.

Held, also, that the failure of the plain-

- tiff alleged in the answer constituted a bar to the suit on the bond. *Ireland v. Montgomery et al.*.....174
2. *Same.—Alternative Modes of Performance.*—Under a bond so conditioned, the right of the obligor to elect between the alternative modes of performance ceases after the date fixed for performance by the bond. No mere notice given by the obligor to the obligee, of the mode in which the former elects to perform, is conclusive on the latter, and no demand by the obligee for a deed is necessary to entitle him to recover the money. *Ibid.*
3. *Proposition not Accepted.*—A mere proposition made by a defendant-surety in a judgment, to the judgment-plaintiff, while the judgment is in full force, that if the latter will accept other sureties from the principal defendant, and release or enter satisfaction of the judgment so as to discharge said defendant-surety therefrom, he will surrender to the principal defendant a promissory note which he holds against said principal defendant, does not constitute a contract, notwithstanding the judgment-plaintiff should afterwards perform the things so to be done by him, unless said judgment-plaintiff agrees with said defendant-surety to accept such other sureties from said principal defendant, or gives said defendant-surety notice that he will act upon said proposition. *Ritenour v. Mathews*279
4. *Dependent and Independent Agreements.*—Where a covenant or agreement might be sued upon as independent, but this has not been done until the party who might thus sue has become bound on his part to perform some act under the same contract, the two acts then become dependent, and neither party can sue the other on the contract without first performing or tendering performance on his part. *Irwin v. Lee*.....319
5. *Same.—Mandate.—Parol Evidence.* Where a person subscribed a certain sum to the capital stock of a turnpike company, in consideration of the agreement of the agent of the company that, if he would so *subscribe*, a lifetime pass over the road for himself and family should be issued to him by the company;
- Held*, in an action by said subscriber against the president of said company for a mandate to compel said president to issue said pass, that if such were a case for a mandate, yet the action would not lie if at the time the suit was brought the money was due on the subscription and payment had not been made or tendered.
- Held*, also, that parol evidence of said agreement to issue a pass was inadmissible.....*Ibid.*
6. *Statute of Frauds.—Abandonment of Lien.*—Where a creditor, having a right to a lien on property for the payment of his claim, abandons such lien to a person having an interest in such property, upon the verbal promise of the latter to pay such debt, not his own, such promise is not within the statute of frauds, and may be enforced against the person making it. *Luark et al. v. Malone et al.*...444
7. *Parties.—Defendants.*—Suit to enforce such a promise for the payment of an amount to be ascertained by settlement of accounts, it not appearing that such settlement had been made. *Held*, that the original debtor was a necessary party defendant.....*Ibid.*
8. *Breach of.*—Where by the terms of a contract between A. and B., the former was to deliver to the latter, on a railroad switch, at a certain place, within a specified time, certain lumber, which B. was to there receive and measure as it should be delivered, and for which he was to pay a stipulated price to A.;
- Held*, that it was a sufficient defense to a suit by B. against A. to recover money advanced by the former to the latter under the contract, in excess of the price of the lumber delivered, and damages for the failure of A. to deliver a portion of said lumber, that A. was ready and willing to deliver the lumber according to the contract, of which fact he notified B., but that B. notified A. that he need not deliver the lumber at said place, unless he would permit B. to ship it to a certain other place and there to measure and receive it, and that A. had been at all times, and then was, ready and willing to deliver said lumber according to the terms of the contract, but that he had been prevented from so doing by the refusal of B. to measure and receive it

- according to the contract. *Sage et al. v. Brown*.....464
9. *Consideration.—Certificate of Scholarship in University.*—In a suit on a promissory note executed by the defendant to a university for a perpetual scholarship therein, the fact that no certificate of scholarship has been delivered or tendered to the defendant cannot constitute a defense. *The Pres't and Trustees of Hartsville Univ. v. Hamilton*.....506

CONTRIBUTION.

- Evidence.—Statute of Frauds.*—A. conveyed certain real estate to B., C., and D., to each an undivided one-third portion thereof, in consideration of the verbal agreement of said grantees to pay a certain indebtedness to E. evidenced by certain commercial paper on which A. was principal and B. surety, but to which C. and D. were not parties. This paper was afterwards renewed by other paper, to which B., C., and D., with another, became parties, without A. The latter paper was renewed by a note given by B. and C., against whom judgment was obtained thereon, one-third of which was paid by C. and the remainder by B.
- Held*, in a suit by B. against D. for contribution, that the plaintiff was entitled to prove the consideration of said deed.
- Held*, also, that D. was liable for contribution. *Boulden v. Scircle*.....60

CORPORATION.

See CITY; CONSTITUTIONAL LAW, 3; PLEADING, 3; RAILROAD; TURNPIKE.

1. *Pleading.*—In a suit on a note executed to a corporation, the maker cannot deny the existence of the corporation at the time of the contract; and its continued existence will be presumed, unless it be shown to have terminated in some way known to the law. *Beaver v. The Pres't & Trustees of Hartsville Univ.*.....245
2. *Same.*—In a suit on a promissory note executed to a corporation, brought by the payee against the maker, the fact that the corporation has ceased to exist since the execu-

tion of the note may be pleaded in abatement, but not in bar. Such answer in abatement must show that the corporation has come to an end by some legal process; the facts upon which the forfeiture of its franchises might be declared cannot be tried in such collateral suit. *The Pres't & Trustees of Hartsville Univ. v. Hamilton*506

COSTS.

See PRACTICE, 2.

1. *City.—Appeal.*—Where in a prosecution by a city to enforce an ordinance thereof an appeal is taken, the city, if unsuccessful, is liable for costs in the appellate court. *City of Kokomo v. Wills*.....48
2. *Draining Association.—Appeal from Appraisers.*—Where on an appeal to the court of common pleas from the proceedings of appraisers appointed under the act of March 11th, 1867, to enable the owners of wet lands to drain and reclaim them, &c. (Acts 1867, p. 186), the appellee recovers judgment, he is entitled to recover the costs in said court, though on such appeal the appellant has reduced the amount allowed against him by said appraisers five dollars or more. *Dearinger v. Ridgeway*...54
3. *Administrator.*—Where in an action by an administrator to recover damages for the death of his decedent caused by the wrongful act of the defendant, judgment is rendered against the plaintiff for costs, it is error to direct therein that, if there be no property of the decedent, the costs shall be levied of the property of the administrator. *Evans, Adm'x, v. Newland*.....112

COUNTY CLERK.

See PRINCIPAL AND SURETY, 4.

COUNTY COMMISSIONERS.

See JURISDICTION, 1; HIGHWAY; OFFICE AND OFFICER, 2; PRACTICE, 23; RAILROAD, 5.

County Bonds.—Powers of County Commissioners.—Injunction.—The board of county commissioners may

issue bonds of the county to raise money to build, complete, or repair county buildings, and for that purpose have power to decide upon the necessity of such construction, completion, or repairs, and that the revenues afforded by reasonable taxation are insufficient therefor, and to fix the time within which the bonds shall be paid, and, in the absence of fraud, the exercise of such power cannot be questioned in a suit to enjoin the issuing of such bonds; but it is required by the statute that the interest on such bonds shall be made payable annually; and if it be ordered by the board that the interest be made payable at shorter periods, the issuing of the bonds may be enjoined at the suit of a citizen and taxpayer of the county. *English et al. v. Smock et al.*.....115

COURT OF COMMON PLEAS.

See INFORMATION.

CRIMINAL COURT.

1. *Constitutional Law*.—Section 7 of the act creating the twenty-fourth judicial circuit (Acts 1869, Reg. Sess. 14) and section 6 of the act creating the twenty-seventh judicial circuit (Acts 1869, Spec. Sess. 48) are invalid, the subject-matter thereof not being expressed in the titles of the acts of which they are parts. *Mullen v. The State*.....540
2. *Of Jefferson County*.—*Act Abolishing*.—The act of 1871 abolishing the Jefferson Criminal Circuit Court is valid; and said court had no power, after the taking effect of said act, to rule upon a motion in arrest of judgment, or to render judgment in a cause pending before it.....*Ibid.*

CRIMINAL LAW.

See LIQUOR LAW.

1. *Venue*.—*Time*.—There can be no conviction under an information for an assault, where the State fails to prove any time or place of the commission of the offense. *Baker v. The State*.....104
2. *Time*.—Under the code, as at common law, an indictment must charge

the offense to have been committed on a particular day stated. *Clark v. The State*.....436

3. *Same*.—An indictment charged the offense to have been committed "on or about the — day of July, 1869, which was the first day of the week, commonly called Sunday."

Held, that the indictment should have been quashed on motion, for failure to designate the time of the commission of the offense.....*Ibid.*

4. *Indictment*.—*Assault with Felonious Intent*.—Since the taking effect of the act of December 2d, 1865 (3d Ind. Stat. 258), defining an assault, an indictment for an assault with intent to commit a felony must charge the assault by setting forth the facts constituting it according to said statutory definition. *Adell v. The State*.543

5. *Change of Venue*.—*Transcript*.—Where in a criminal cause taken by a change of venue from one circuit court to another, no transcript, or an insufficient transcript, of the proceedings in the former court has been filed in the latter court, and the defendant has moved the court, for that reason, to quash the proceeding and dismiss him, it is not error for the court to permit the prosecuting attorney, on his motion, to place such transcript on file.....*Ibid.*

6. *Same*.—*Original Indictment*.—Upon a change of venue in a criminal case from one circuit court to another, the transcript of the proceeding in the former court should show the transfer of the original indictment to the latter court.....*Ibid.*

CUSTOM.

1. *Certainty*.—Where, in attempting to show, in explanation of a contract of sale, a local commercial usage that cash sales were not made for cash in hand, but that payment might be made afterwards and the transaction still be regarded as a sale for cash, the evidence was uncertain as to the number of days given and whether the time given was computed from the date of the sale or the date of delivery, and showed that the usage of giving time ceased soon after the transaction in question;

Held, that the evidence was insufficient

- to prove the custom. *The Union R. R. Co. et al. v. Yeager et al.*.....1
2. *Landlord and Tenant*.—A stipulation in a lease of land for farming, that the crop when harvested shall be divided according to the custom prevailing among the farmers of the neighborhood in which the land is situated, is valid. *Clem v. Martin*.341

D

DAMAGES.

See ASSAULT AND BATTERY.
Excessive. See SUPREME COURT, 13.
Measure of. See VENDOR AND PURCHASER, 10.

1. *Nominal*.—A breach of a contract renders the party breaking it liable for at least nominal damages in a suit against him on the contract brought by the other party. *Rosenbaum et al. v. McThomas*.....331
2. *Excessive*.—*Motion for New Trial*. If excessive damages be not assigned as a cause in a motion for a new trial, such objection is waived.....*Ibid*.

DECEDENTS' ESTATES.

See COSTS, 3; EXECUTOR AND ADMINISTRATOR; HUSBAND AND WIFE, 3; PLEADING, 9.

1. *Unclaimed Share*.—*Parties*.—*Pleading*.—On final settlement of a decedent's estate, in the court of common pleas, a sum of money was received by the clerk of said court as the share of said estate belonging to a nephew of the decedent, to be kept by said clerk till said nephew should call for it. Complaint by some of the heirs at law of said decedent against the administrator of the estate of said clerk, deceased, alleging the receipt of said sum by the clerk as above stated; that said clerk died without having been called upon for said money by said nephew, who had not been heard from for seven years; and that the plaintiffs, assuming his death, claimed his share in his uncle's estate. *Held*, that the complaint was bad on demurrer assigning as causes, that the plaintiffs had not legal capacity to sue, and that the complaint did not

- state facts sufficient, &c. *Turner et al. v. Campbell, Adm'r*.....317
2. *Transfer of Settlement to Circuit Court*.—*Supreme Court*.—An objection to the transfer of the settlement of a decedent's estate from the court of common pleas to the circuit court cannot be made for the first time in the Supreme Court.....*Ibid*.
3. *Same*.—*Affidavit*.—Where an affidavit upon which such a transfer has been made is not in the record, the Supreme Court will presume that the affidavit was properly made under the statute.....*Ibid*.
4. *Practice*.—*Claim Against Decedent's Estate*.—Where a complaint shows on its face that the action is to recover a claim against the estate of a decedent, and the proceeding has been commenced, not by filing a claim, but as an ordinary action, the suit should be dismissed on motion. *Hyatt, Adm'r, v. Mavity, Ex'r*.415
5. *Heir*.—A., who was a soldier, being at home on furlough, deposited \$175 with B., who thereupon executed a written instrument as follows: "Due" A. "\$175, which I am to pay him when called on, and in case of his death, I am to pay it to his sister," C., "or her guardian; and it is further agreed that I am not to pay any interest on the same, unless I should use it my business; then I am to pay six per cent. for the time I use it, keeping an account of the length of time I use it;" dated, and signed by B. A. returned to the army, and there died, leaving said sister and a brother as his only heirs at law, and said sum was paid by B. to the guardian of C. *Held*, in a suit by said brother of A. against said sister and her guardian, to recover one-half of said sum, there having been no administration of the decedent's estate, and there being no debts against it, that the plaintiff was not entitled to recover. *Baker v. Williams et al*.....547

DEFAULT.

See PRACTICE, 4, 5, 24.

DEMAND.

See BILLS AND NOTES, 3.

DEMURRER.

See JURISDICTION, 5; PARTIES, 2; PRACTICE, 8, 13; SUNDAY; SUPREME COURT, 22, 23, 24.

A demurrer to an entire pleading should be overruled if such pleading contain any good paragraph. *Heavenridge v. Mondy*.....28

DEPOSITION.

1. *Official Character of Officer Before Whom Taken.*—A deposition taken in another state, to be used in evidence in this State, is invalid and should be suppressed on motion, if taken before any other than an officer authorized by our laws to take depositions, whether the officer before whom it was taken was so authorized by the laws of such other state or not, and although the party making the motion had waived *dedimus* and certificate of the official character of the officer, and appeared at the taking and offered no objection then to the official character of the officer. *Thompson v. Wilson*.....94
2. *Same.*—Notice to take depositions in another state, "before some officer authorized to administer oaths." The party to whom notice was given waived *dedimus* and certificate of the official character of the officer before whom the depositions should be taken. The depositions were taken before one who certified that he was "a commissioner in chancery for the circuit court," &c. *Held*, on motion to suppress, that the depositions were void for want of authority in the officer who took them.....*Ibid.*

DIVORCE.

See JUDGMENT, 3; JURISDICTION, 3; VENUE, 1.
Alimony. See JOHN v. JOHN, 335.

1. *Supreme Court.*—The Supreme Court may, upon appeal, reverse a judgment granting a divorce. *Sullivan v. Sullivan*.....368
2. *Condonation.—Doctrine of, Where Applicable.*—In actions for divorce, the doctrine of condonation applies to cruel treatment as well as to adultery.....*Ibid.*

3. *Same.—Evidence.—Pleading.*—Where in an action for a divorce on the ground of cruel treatment, the complaint shows a condonation, and that the condition, which constitutes an element of condonation, that the offense shall not be repeated, and that the forgiven party shall treat the other with kindness, has been broken, as well as where in such an action the condonation is shown by answer, and the violation of such condition is shown by reply, the plaintiff is entitled to introduce evidence of acts of cruel treatment before the condonation, as well as those after it; and it is not necessary, in order to entitle the plaintiff to a divorce, that the acts occurring after the condonation should of themselves, independent of those occurring before, constitute a cause for divorce.....*Ibid.*

DRAINING ASSOCIATION.

See COSTS, 2.

DRUNKARD.

1. *Habitual Drunkard.—Legislative Control.*—The act of March 9th, 1867 (Acts 1867, p. 109), "to provide for the care and custody of the person and estate of habitual drunkards," is an enactment within the power of the legislature. *Devin, Guard., v. Scott et al.*.....67
2. *Same.—Contracts of Drunkards under Guardianship.—Injunction.* An inquisition under said act by which it is found that a person is an habitual drunkard and incapable of managing his estate, or that there is danger of his squandering it, and the appointment of a guardian for him, are conclusive evidence of the incapacity of such person to make a contract while under such guardianship, and the collection of a judgment rendered against a person while under such guardianship, the guardian not being a party thereto and having no knowledge thereof until after its rendition, on a contract made by said person after inquisition found, will be enjoined at the suit of the guardian, when it does not affirmatively appear that the contract was for necessities furnished said person, the guardian having failed to make needful provision..... *Ibid.*

E

ELECTION.

See CITY, 12; RAILROAD, 7.

1. *Mode of Conducting.—Directory Statutes.*—Statutes regulating the mere mode of conducting elections are directory, and any departure from the prescribed mode will not vitiate an election, if the irregularity does not deprive any legal voter of his vote, or admit a disqualified voter to vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it. *Gass v. The State, ex rel. Clark*.....425
2. *Same.—Statute Construed.*—The reason and spirit of the statutory provision on the subject of contesting elections (1 G. & H. 318, sec. 15), that “no irregularity or misconduct of any member or officer of a board of judges or canvassers shall set aside the election of any person, unless such irregularity or misconduct were such as to cause the contestee to be declared elected when he had not received the highest number of legal votes,” are applicable to an election to a city office, as well as to a state, county, or township office; and said provision announces a principle of law which prevails independently of the statute.....*Ibid.*

ESTOPPEL.

See CITY, 1, 5; HUSBAND AND WIFE, 3; JUDGMENT, 1; VENDOR AND PURCHASER, 3.

Jurisdiction.—Suit before the mayor of a city for rent, and an attachment thereunder, on which was seized the property of the defendant, who executed a delivery bond therefor with surety. Upon the defendant's oral motion, on the ground that the title to real estate was involved, the cause was certified to the circuit court, in which the defendant appeared, and, after taking various steps in the cause, withdrew his appearance and was defaulted, and judgment was rendered against him for the debt, and an order was made for the sale of the attached property.

Held, in a suit on said bond, that said defendant and the surety on said bond were estopped to deny the jurisdiction of the circuit court in said attachment proceeding. *Bowen v. Reed*.430

EVIDENCE.

See ASSAULT AND BATTERY; BASTARDY; CONSIDERATION, 1, 2; CONTRACT, 5; CONTRIBUTION; DEPOSITION; DIVORCE, 3; JUDGMENT, 3; JURISDICTION, 4, 5; MINOR, 4; PRINCIPAL AND SURETY, 3, 6; RAILROAD, 10; SUPREME COURT.

1. *Revenue Stamp.—Recorder's Certificate.*—A certified copy of the record of a mortgage is not rendered inadmissible in evidence by the want of a revenue stamp upon the recorder's certificate, such official instruments being exempt from stamp duty. *Hawes v. Rhoads, Adm'r*.....79
2. *Foreclosure of Mortgage.—Production of Note.*—In a suit by the holder of a mortgage given to secure the payment of a note, to foreclose the mortgage, no personal judgment being sought, the plaintiff need not produce the note and offer it in evidence, if it be in the possession of the defendant.....*Ibid.*
3. *Presumption as to Improper Evidence.*—Where material evidence has been improperly admitted, it will be presumed that it influenced the verdict, unless the contrary clearly appear. *Thompson v. Wilson*.....94
4. *Admissions.*—Evidence of admissions of a party should be received with great caution. The credibility of the witness, his testimony in proof of the admissions, and the force of the admissions when proved, are matters for the jury. *Evans, Adm'r, v. Newland*.....112
5. *New Trial.—Weight of Evidence.* When a verdict is not sustained by sufficient evidence, it is the duty of the court trying the cause to grant a new trial, upon motion assigning that cause; but the Supreme Court will not reverse the ruling of the court below in refusing to grant a new trial on such ground, unless it appear, not merely that the finding was contrary to the weight of the evidence, but that it was wrong beyond any question whatever.....*Ibid.*

6. *Declaration of Agent*.—The declarations of an agent are not admissible in evidence in favor of his principal, either before or after the death of the agent. *Hall v. Hall et al.* 314
7. *Admissions*.—*Contrary Declarations*.—Where the statements of a party have been proved, as admissions, and not with a view to impeach him as a witness, he will not for that reason be allowed to prove his own statements at other times, of an opposite character and in harmony with his own testimony.....*Ibid.*
8. *Pleading*.—*Promissory Note*.—In a suit on a promissory note, want of consideration, mistake, or the concurrent execution of an instrument that may modify or control the legal effect of the note, cannot properly be given in evidence by the defendant under an answer of payment, and if given in evidence, cannot establish such an answer. *Lowry v. Shane et al.* 495
9. *State Courts*.—*Acts of Congress*.—The Congress of the United States cannot control the rights of parties in the introduction or the weight of evidence in a state court, against the laws of the state, in a case arising purely under the laws of the state and properly before such court. *Wallace v. Cravens*.....534
10. *Same*.—*U. S. Revenue Stamp*.—The want of a United States revenue stamp upon an assignment of a title-bond cannot render such assignment inadmissible in a state court.....*Ibid.*

EXCEPTIONS.

See PRACTICE, 15, 19; SPECIAL FINDING; SUPREME COURT.

EXECUTION.

See EXECUTOR AND ADMINISTRATOR, 2.

EXECUTOR AND ADMINISTRATOR.

See COSTS, 3; MINOR, 1, 2; MORTGAGE, 2.

1. *Co-Administrators*.—*Joint Bond*.—Where co-administrators execute a joint bond as such, each is liable thereunder for the acts and omissions of the other. *Prichard et al. v. The State, ex rel. Keller et al.* 137
2. *Same*.—*Suit on Bond*.—*Sureties*.

Execution.—Where, in an action on such joint bond, judgment is rendered for the plaintiff, the sureties on the bond have a right to an order directing that the execution to be issued on the judgment be first levied on the property of the principals, although one of the principals may have taken possession of the entire assets of the estate and administered the estate, so far as it has been administered, and the other administrator has never received any of said assets. *Ibid.*

3. *Abatement*.—The right of a plaintiff to sue as an executor or administrator can be called in question only by answer in abatement sworn to. *Nolte v. Libbert, Adm'r*.....163
4. *Accord and Satisfaction*.—An administrator may receive in satisfaction of a note payable to him as administrator a claim, existing in account, of the maker against a third person; but the maker cannot be so released if there be no assignment of said claim to the administrator, and no agreement by said third person to pay the administrator, and said note be retained by the administrator. *Hancock, Adm'r, v. Morgan et al.* 524

F

FRAUD.

See PLEADING, 1, 3; VENDOR AND PURCHASER, 10.

1. *Fraudulent Conveyance*.—Where it is sought to subject lands to the payment of debts because of a fraudulent conveyance, it must be shown that the grantee had notice of the fraudulent intent. *Kyger v. The F. Hull Skirt Co. et al.*.....249
2. *Promise*.—A representation upon which fraud can be predicated must be of an existing fact, or of a fact alleged to exist, and cannot consist of a mere promise. *Fouty v. Fouty et al.*.....433
3. *Pleading*.—*Mutual Insurance Company*.—*Premium Note*.—Suit by the receiver of a mutual insurance company upon a premium note executed to said company by the defendant, whose answer and cross complaint, set out in the opinion of the court, alleging, at great length, fraudulent representations of the agent of said company as to matters of law and of

fact, &c., was held sufficient on demurrer. *Whitman v. Meissner et al.* 487.

4. *Fraudulent Representations.*—A false representation upon which fraud may be predicated must be of an existing fact, or a fact alleged to exist at the time, and cannot consist of a promise to be performed in the future or of a false statement as to the legal construction or effect of a written contract executed by the person to whom the representation is made at the time of the making of the representation. *The Pres. & Trustees of the Hartsville Univ. v. Hamilton.* 506

G

GARNISHMENT.

See JURISDICTION, 7.

GRAVEL ROAD.

See TURNPIKE.

GUARDIAN AND WARD.

See DRUNKARD, I, 2.

Guardian's Sale. See PRACTICE, 16, 17.

1. *Guardian ad Litem.*—*Practice.*—Where the guardian of a defendant appears and defends for his ward, it is unnecessary for the court to appoint a guardian *ad litem*. *Hughes v. Sellers et al.*.....337
2. *Guardian's Bond.*—*Removal of Guardian.*—The failure of a guardian to give a bond sufficient to secure to his ward, when the period of his wardship shall terminate, the amount of a pension coming to the ward from the government, is a sufficient cause for the removal of the guardian, without regard to the fact that the amount of the pension may be needed for the maintenance and education of the ward. *West v. Forsythe.*.....418

H

HIGHWAY.

See SUPREME COURT, 10.

1. *Proceeding to Lay Out.*—*Damages.* A proceeding to lay out and establish a highway is not rendered erroneous

by the fact that the damages, or a part thereof, assessed to a remonstrator, and ordered to be paid to him out of the county treasury, have been shown, during the progress of the proceeding, to have been paid into the treasury for the use of said remonstrator by a petitioner for such highway. *Cummins v. Shields et al.*.....154

2. *Same.*—*Statute Construed.*—It seems that the provision of the statute (1 G. & H. 363, sec. 16), that the viewers, in laying out or changing a highway, shall not run "through any person's inclosure of one year's standing, without the owner's consent, unless, upon examination, a good way cannot otherwise be had," is properly construed by adding thereto the words, *without departing essentially from the route petitioned for.*.....*Ibid.*

3. *Same.*—*Remonstrance.*—*Waiver.*—In a proceeding to lay out and establish a highway, a person filed with the board of county commissioners two remonstrances, the first relying upon the ground that the proposed highway was not of public utility; the second upon the ground that it ran through his inclosed land, damaging him to the extent of a certain sum specified, and asking the appointment of reviewers to assess his damages; and no additional defense was set up during the progress of the proceeding.

Held, that these remonstrances raised no objection to the proposed highway on the ground that it would run through the remonstrator's inclosure of one year's standing without his consent, and that a good way could otherwise be had; but, on the contrary, he thereby impliedly waived such objection.....*Ibid.*

4. *Appeal.*—In a proceeding to establish a highway, an order of the board of county commissioners refusing to pay out of the county treasury the damages assessed by viewers to one through whose land the road would run, is a sufficiently final decision to authorize an appeal to the circuit court by the petitioners for the establishment of the highway. On such appeal the entire proceeding goes to the appellate court, which has full power to make a final disposition thereof; and if the appeal by said petitioners be taken in term, all the

- adverse parties before the commissioners must take notice of the appeal, and the omission of the name of one of the appellees in the title of the cause in the docket of the appellate court is unimportant. *Smith et al. v. Searce*.....285
5. *Location of.—Petition.*—A petition to the board of county commissioners for the location of a public highway must give the names of the owners and occupants or agents of all lands over which the proposed road is to run; and it is not a sufficient designation of such owners to say that they are the heirs of a person named. An objection to the petition because of its failure to give such names or a portion of them is not waived by the failure to make it before said commissioners, but may be raised by motion in arrest of judgment on appeal to the circuit court. *Hughes v. Sellers et al.*.....337
6. *Same.—Viewers.—Report of.*—In a proceeding before the board of county commissioners to locate a public highway, the report of the first viewers appointed is insufficient if it do not show that they have laid out and marked the highway, and, when it runs upon the line dividing the lands of different proprietors, that they have so laid it out that each adjoining owner shall give half of the road; and second viewers, appointed upon remonstrance being made, have no authority to lay out and mark the highway*Ibid.*
- tled to hold the land. *Kyger v. The F. Hull Skirt Co. et. al.*.....249
2. *Same.*—When a man invests his wife's money in land, and, without her knowledge or consent, takes the deed therefor in his own name, and afterwards sells such land, she is entitled to the entire sum received therefor. *Dayton v. Fisher, Adm'r*...356
3. *Same.—Estoppel.—Decedents' Estates.*—Where a man dies seized of land purchased in part with his own money and in part with money belonging to his wife, the deed being taken in his name without her knowledge or consent, she is entitled to recover from his estate the amount of her money so invested; and in the prosecution of such claim against said estate she will not be estopped by the facts that she attended a sale, made by the administrator of said estate under an order of the proper court, of two-thirds of said land, and did not make any objection to such sale, but herself bid thereat, and that in an action by the purchaser at such sale against her for partition of said land, she set up her claim to an interest in said land beyond her one-third thereof as widow, because of its purchase with her money in part, and her claim to such equitable interest was disallowed, and partition was awarded without regard thereto.....*Ibid.*

HUSBAND AND WIFE.

1. *Wife's Separate Property.*—A married woman, in 1865, loaned to her husband a sum of money belonging to her. Afterwards said husband traded a stock of goods to a third person, in part payment for a tract of land, the deed being taken in the name of the wife, who executed notes and a mortgage on the land for the residue of purchase-money, said conveyance being procured to her and received by her in payment of the money so loaned by her to her husband. *Held*, in an attachment proceeding by the husband's creditors, that, in the absence of actual fraud, the wife was to be regarded as a purchaser for a valuable consideration and was enti-

Court of Common Pleas.—Jurisdiction. The court of common pleas has jurisdiction of an information in the nature of a *quo warranto* for usurping an office, filed in said court upon the relation of one claiming an interest in the office. *Gass v. The State, ex rel. Clark*.....425

INJUNCTION.

See CITY, 1; COUNTY COMMISSIONERS; DRUNKARD, 2; JUDGMENT, 2; TURNPIKE, 1, 2, 3; VENDOR AND PURCHASER, 4, 6.

INSTRUCTIONS TO JURY.

See PRACTICE, 19, 20, 26. SUPREME COURT, 25.

INSURANCE.

Mutual insurance company, receiver.
See WHITMAN v. HALL, 422; FRAUD,
3.

INTEREST.

See COUNTY COMMISSIONERS.

1. "Annual Interest."—Construction.
When an instrument provides for the payment of "annual interest," and is silent as to when the interest shall be paid, it is payable at the end of each year. *English et al. v. Smock et al.* 115
2. *In Advance*.—It is not usurious or illegal to take interest in advance at the highest rate of interest allowed by law.....*Ibid.*

INTERROGATORIES.

To party. See PRACTICE, 3.

To jury. See PRACTICE, 14; SUPREME COURT, 25.

1. *To party.—How Used*.—The answers of a defendant under oath to interrogatories propounded to him by the plaintiff, under section 303 of the code, cannot be used in support of a motion to strike out an answer of general denial. *Mooney et al. v. Musser et al.*.....373
2. *To Jury.—Answers.—Signing by Foreman*.—Answers to special interrogatories propounded to a jury by the court are in the nature of a special verdict and have the same force and effect, and they must be signed by the foreman, the better practice being for him to sign each answer. *Sage et al. v. Drown*.....464
3. *Same*.—Either party has the right to demand that such interrogatories shall be fully answered, and that the answers shall be signed by the foreman; and upon such demand being made it is the duty of the court to keep the jury together until the demand be complied with.....*Ibid.*

J

JOINDER OF CAUSES.

See ATTORNEY'S FEES, 2; PRACTICE, 2.

JOINT CONTRACT.

See EXECUTOR AND ADMINISTRATOR,
1, 2; PRACTICE, 4.

JUDGMENT.

Demand of. See PRACTICE, 25.
Lien of. See SHERIFF'S SALE, 1; PRACTICE, 4, 5.
Taken through mistake, &c. See PRACTICE, 9, 10, 21, 22.
Suit on. See JUSTICE OF THE PEACE.
Form of. See SUPREME COURT, 32.

1. *Jurisdiction.—Scire Facias.—Estoppel*.—A declaration in debt was filed in the circuit court in 1840, on the back of which was a writing signed by the defendant and dated three days prior to the filing of the declaration, to the effect that he confessed the indebtedness mentioned in the declaration, to the amount of a certain sum, and desired that judgment be rendered against him for that amount. The record stated that upon the filing of said declaration the plaintiff proved to the satisfaction of the court by oath of a person named that said "cognovit" was duly executed by the defendant, and that he was still living. And thereupon judgment was entered against the defendant for said amount. In 1845 said defendant died, and in 1849 the judgment-plaintiff sued out a *scire facias* from said court against the administrator and heirs of said decedent, which was duly served upon them, requiring them to show cause, if any they had, why execution should not be issued upon said judgment, to be levied upon certain real estate owned by the judgment-defendant at his death. The administrator and heirs failed to appear or show any cause, and the court awarded execution on said judgment, to be levied on said real estate, and execution was accordingly issued, upon which said real estate was sold by the sheriff to the agent of the execution-plaintiff.

Held, in a suit by said heirs to recover possession of said land from the grantee of the purchaser at said sheriff's sale, that said original judgment, it being evident from the record thereof that there was neither service of process nor appearance of the defendant, in person or by attorney, was void; but,

Held, also, that said heirs were estopped by the judgment on *scire facias* from controverting the validity of said orig-

inal judgment. *Comparet et al. v. Hanna et al.*.....74

2. *Effect of Granting New Trial.—Injunction.*—The granting, unconditionally, of a new trial in a cause as effectually vacates a judgment previously rendered therein as if the judgment were set aside in express terms; and an injunction will lie to prevent the collection of such judgment. *Rickets et al. v. Hitchins et al.*.....348

3. *Review of.—Evidence.—Divorce.*—In an action by a wife for a divorce, the plaintiff was granted a divorce, and it was also adjudged that she should pay to her husband a certain sum, and that he should at a certain date leave certain land owned by her on which he was residing. Afterwards, suit by her against him to review and correct said decree, so as to omit that portion thereof relating to the payment of money by her and to his leaving said land, as having been entered by the mistake of the clerk and without the order of the court. Upon the evidence, showing that the pleadings in said action for a divorce involved no issue except the question of the wife's right to a divorce, and showing that in the minutes of the judge on the court docket, which fully showed the various steps taken in the cause, the only minute of the decree was "divorce decreed" (though it appeared from the record in the suit for a divorce that the jury found, in answer to an interrogatory, that before the suit there was an agreement to a separation, that the wife agreed to pay the husband said sum, that the defendant was therefore entitled to said amount, and that he should leave said land at the date fixed by said decree), together with the fact that on general principles such an agreement could not be enforced, and such a decree could not be rendered in a suit for a divorce;

Held, that it was proper to so correct the decree. *Hardy v. Kirtland.*..365

JUDICIAL NOTICE.

1. *Townships.*—The Supreme Court does not judicially know the names of the townships composing a county in this State. *Bragg et al v. The Comm'rs Rush Co. et al.*.....405

2. *City.—Mt. Vernon.*—It seems that perhaps the Supreme Court may judicially know that Mt. Vernon is a city of less than ten thousand inhabitants. *Kalbrier v. Leonard.*....497

JURISDICTION.

See COUNTY COMMISSIONERS; ESTOPPEL; INFORMATION; JUDGMENT, 1; WATER CRAFT.

1. *Courts of Inferior and Limited Jurisdiction.—Discretion.*—When statutory powers are conferred upon a court of inferior and limited jurisdiction, as the board of county commissioners, and a mode of exercising those powers is prescribed, the mode prescribed must be strictly pursued, or the acts of such court will be *coram non judice* and void; but where such a court has been entrusted with discretionary powers, no other court can interfere with such discretion or control the exercise thereof, as to acts performed in good faith within the power conferred. *English et al. v. Smock et al.*.....115

2. *Special Appearance.*—The question whether jurisdiction of the person of the defendant in a civil action has been acquired by the court can be raised in such action, not by an attorney as *amicus curiæ*, but only by a special appearance; and the better practice is to present it by plea in abatement. *Baily v. Schrader.*..260

3. *Divorce.—Custody of Children.*—Where in a suit for a divorce, the court having jurisdiction of the subject-matter and of the parties, an order has been made granting the custody of the children of the marriage to one of the parties until the further order of the court; afterwards, in an application to change said order, the court retains its jurisdiction of the subject-matter and of the parties, without reference to change of residence.....*Ibid.*

4. *Justice of the Peace.—Collateral Proceeding.*—Where the judgment of a justice of the peace of another state is relied upon as a cause of action or as a ground of defense, it must be alleged, generally, that the judgment or decision was duly given or made, as authorized by section 83 of the code, or the facts showing the jurisdiction and authority must be

especially set forth; and in either case, where the allegation of jurisdiction is denied, the facts which authorized the exercise of jurisdiction must be proved. *The T. W. & W. R. W. Co. v. M'Nulty*.....531

5. *Copy of Judgment.—Demurrer.*—Where a judgment is relied upon as a cause of action or as a ground of defense, and a copy of the judgment filed with the pleading in which it so relied upon shows upon its face that the judgment is invalid, a demurrer to the pleading is properly sustained, unless the allegations of the pleading would warrant the introduction of extrinsic evidence which would render the judgment valid.....*Ibid.*
6. *Justice of the Peace.*—A justice of the peace has no common law jurisdiction in civil cases; his powers in that regard are statutory.....*Ibid.*
7. *Same. — Garnishment.* — Suit for work and labor. Answer, that the defendant had been adjudged to pay a part of the amount of the plaintiff's claim, as garnishee, at the suit of a third person, before a justice of the peace of another state named, the defendant offering to confess judgment for the residue of the plaintiff's claim. The transcript of the proceeding before said justice and certain statutes of said state were filed with the answer, from which it did not appear that there was any notice to the defendant in the principal action before said justice; but it appeared that the money was paid voluntarily, before judgment against the principal defendant, and upon an insufficient affidavit against the garnishee.

Held, that the answer was bad on demurrer..... *Ibid.*

JUSTICE OF THE PEACE.

See APPEAL, 3; JURISDICTION, 4, 6, 7; REPLEVIN, 1, 2, 3; SUPREME COURT, 22.

Judgment.—Suit on.—A judgment of a justice of the peace, rendered against a defendant on his default, may be made the foundation of an action commenced before the expiration of ten days from the rendition

thereof. *Fravel v. Springfield Tp., Laporte Co*.....296

L

LANDLORD AND TENANT.

See CUSTOM, 2; PARENT AND CHILD, 1; PLEADING, 2.

Lease. — Construction of. — Notice to Quit.—A lease of a farm provided that the tenant was to have and hold said premises for one year from April 1st, 1867, and to have the privilege of said farm two or three years, if the farm was for rent, if the tenant suited the landlord, and if they could agree on the rent. Without any other contract, the tenant continued in possession after the expiration of the first year, the landlord having told him in the fall of the second year, that he could not have the premises longer, that he, the landlord, wished to take possession himself in the spring.

Held, in a suit commenced by the landlord April 7th, 1869, for possession, that he was entitled to recover possession without having given any notice to quit. *Whetstone v. Davis*..510

LIQUOR LAW.

See APPEAL, 1, 2.

Indictment.—In an indictment for selling intoxicating liquor without a license, if the selling be charged as of a less quantity than a quart at a time, it is not necessary that it should also be charged that the liquor sold was to be drunk in the defendant's house, out-house, yard, garden, or the appurtenances thereto belonging. *Compher v. The State*, 18 Ind. 447, explained. *Clark v. The State*....436

M

MANDATE.

See CITY, 13; CONTRACT, 5.

MINOR.

See PARENT AND CHILD, 2.

1. *Mortgage*.—Where a mortgage was made to one, the money secured thereby being payable to another, a minor, who afterwards died before reaching majority;

Held, in a suit by the administrator of said minor to foreclose the mortgage, that the complaint was not bad for failing to allege that the minor accepted of and assented to the contract. *Nolte v. Libbert, Adm'r.* 163

2. *Same*.—Where a mortgage was given to secure the payment of money to one, at the time a minor, when he should arrive at the age of twenty-one years, and he died before reaching that age;

Held, that an action on the mortgage could be maintained by the personal representative of said minor, commenced at the time when the latter, if living, could have brought the suit.....*Ibid.*

3. *Suit for Services*.—*Set-Off*.—In an action to recover for work and labor done by the plaintiff for the defendant at the request of the latter while the former was a minor, he may recover whatever such services were reasonably worth, not being bound by any special contract as to the time he was to work or the amount to be paid him for his services; and the defendant may set off against the amount so recovered the reasonable value of necessities furnished the plaintiff during the period of such service, such as food, clothing, schooling, &c. *Meredith v. Crawford.* 399

4. *Same*.—*Evidence*.—On the trial of such an action, the value of clothing furnished by the defendant to the plaintiff being in issue, the defendant asked a witness the following question: "Are you acquainted with the cost of furnishing necessary clothing per year for a girl of the age and size of the plaintiff, during the years she resided at the defendant's house?" And the court refused to allow the question to be answered.

Held, that this was not error.*Ibid.*

MISJOINDER OF CAUSES.

See PRACTICE 2.

MORTGAGE.

See EVIDENCE, 1, 2; MINOR, 1, 2;

SHERIFF'S SALE; VENDOR AND PURCHASER, 1.

1. *Chattel Mortgage*.—*Vessel of United States*.—Where before a vessel has been registered or enrolled as a vessel of the United States, a mortgage is executed thereon and duly recorded according to the law of this State, it will be valid against a person purchasing such vessel, for value and without actual notice of the mortgage, after the vessel has been enrolled in the office of the surveyor of a port of delivery, although the mortgage be not recorded in said office. *Stinson v. Minor*.....89

2. *Administrator*.—Where a mortgage is executed to one to secure money to be paid to another, the latter, if alive, can maintain a suit to foreclose the mortgage, and if he be dead, the action is properly brought by his administrator. *Nolte v. Libbert, Administrator*.....163

3. *Foreclosure*.—*Pleading*.—*Description of Lands*.—Suit to foreclose a mortgage, the complaint alleging, that on, &c., the defendant conveyed, warranted, and mortgaged to, &c., certain tracts of land accurately described, to secure a debt evidenced by said mortgage, a copy of which was filed with the complaint, the only description of the land contained in the mortgage being, "ninety-nine acres and 76-100 this day deeded to him." It was not further alleged that the land described in the complaint was the same as the land so described in the mortgage, or that it was the land described in the deed referred to in the mortgage; nor was said deed set out; nor was the description contained in said deed shown.

Held, on demurrer, that the complaint was bad for want of sufficient description of the land mortgaged. *Ibid.*

4. *Judgment Lien*.—*Redemption*.—*Act of 1861*.—Where a mortgage on real estate is foreclosed, and the property is sold under the decree, there being, at the commencement of the suit, a judgment lien on said real estate junior to said mortgage, and the judgment creditor not being a party to the foreclosure suit, his rights are not affected by the fore-

closure and sale, and the provisions of the redemption law of June 4th, 1861 (2 G. & H. 251), do not apply to him or affect him as to such sale.

An execution issued on said judgment before the expiration of the statutory lien of the same, and after the expiration of one year from said sale, the property not having been redeemed, and a deed therefore having been executed by the sheriff to the purchaser, may be levied upon said real estate, and the same may be sold thereunder, subject to said mortgage as if it had not been foreclosed.

Holmes et al. v. Bybee et al......262

5. *Same.*—*Junior Mortgage*.—Under circumstances similar to these, the rights of a junior mortgage creditor would be essentially the same as those of a junior judgment creditor.

Ibid.

6. *Foreclosure.—Priority of Lien.*—A. sold certain real estate to B., to whom he gave a title bond therefor, and B. assigned and delivered said title bond to a certain firm to secure an indebtedness of B. to said firm. Afterwards B. executed a mortgage on said real estate to C., who assigned it to D. Subsequently, A., having been paid for the land, conveyed it in fee simple to the wife of C., said firm surrendering to A. the title bond and accepting from C. and wife, for the debt due said firm, less a part thereof thrown off, a note and mortgage on said land, which note and mortgage was, for convenience, taken in the name of one of the partners, this arrangement being made by the consent of B., C. and wife, and said firm; D. having no knowledge of the transaction, and said firm having no actual knowledge of said mortgage held by D., which had been recorded.

Held, that the lien of said mortgage made to said partner was prior to that made to C. and assigned to D. *Calvert v. Landgraf et al.*.....388

MOUNT VERNON.

See JUDICIAL NOTICE, 2.

N

NEW TRIAL.

See DAMAGES, 2; EVIDENCE, 5; JUDG-

MENT, 2; PRACTICE, 19; SPECIAL FINDING, 2; SUPREME COURT; VERDICT.

1. *As of Right*.—Where a new trial is granted as of right, under section 601 of the code, at a term after that at which the judgment was rendered, the party against whom the new trial is granted cannot be required to go to trial at the term at which the new trial is granted. *Skeen et ux. v. Muir et al.*.....310

2. *Same.*—*Notice.—Statute Construed*. The notice contemplated by section 602 of the code is to be given after the application for a new trial has been granted.....*Ibid.*

3. *Same.*—*When to be Granted*.—In a suit by the purchaser of real estate in possession under the contract of purchase, to compel the vendor to make a deed therefor to the plaintiff and accept from him a mortgage for unpaid purchase-money, and to set aside as void a deed made by the Auditor of State for said land sold at a sinking fund sale, for having been procured by fraud, and enjoin the execution of a writ of possession issued by said auditor, judgment was rendered against the defendants.

Held, that the defendants were entitled to a new trial as of right, under section 601 of the code.....*Ibid.*

NON COMPOS MENTIS.

See UNSOUND MIND.

NUNC PRO TUNC ENTRY.

See PRACTICE, 16, 17.

O

OFFICE AND OFFICER.

1. *Compensation of Public Officer*.—The compensation of public officers is fixed and regulated by statute; and in the absence of a statute giving compensation, none can be recovered. *Board of Comm'rs of Jay Co. v. Templer*.....322

2. *Same.*—*Prosecuting Attorney*.—A county is not liable to pay a prosecuting attorney for services rendered by him as prosecuting attorney, at the

request of the county commissioners made of him as such attorney, in prosecuting a suit and obtaining judgment against a defaulting officer and his sureties *Ibid.*

OFFICIAL BOND.

See PRINCIPAL AND SURETY, 4; TOWNSHIP TRUSTEE.

OPEN AND CLOSE.

See PRACTICE, 12, 18.

P

PARENT AND CHILD.

See JURISDICTION, 3.

1. *Occupation of Real Estate by Permission.*—Where a son, in consideration of natural love and affection, permits his mother to occupy real estate owned by him, without any agreement or understanding that she shall pay rent, the law will not imply a promise by her to pay rent. *Wills v. Wills*.....106
2. *Custody of Minor.*—*Indiana Soldiers and Seamen's Home.*—On the 6th of November, 1868, a minor, an orphan child of a deceased Indiana soldier, was received into the Indiana Soldiers and Seamen's Home, upon a written instrument signed by the mother of said child, reciting, that she thereby surrendered said child "to the care and guardianship" of the trustees of said Home, to be under the control of said trustees, to do with said child as they might think best for the interest of the child, without specifying any time during which the child should so remain. *Held*, that in the absence of anything showing that the mother was not a suitable person to have the custody of the person of said minor, she was entitled to regain such custody at any time. *Wishard v. Medaris*.....168

PARTIES.

See ATTORNEY'S FEES, 2; CONTRACT, 7; DECEDENTS' ESTATES, 1; EXECUTOR AND ADMINISTRATOR, 2; MINOR, 1, 2; MORTGAGE, 2; VENDOR AND PURCHASER, 8; WITNESS.

1. *Trustee of Express Trust.*—Suit by

A. on a promissory note made payable to A. (for B.) or order.

Held, that A. was the trustee of an express trust within the statutory definition, and the action was properly brought in his name. *Heavenridge v. Mondy*.....28

2. *Assignor.*—*Demurrer.*—In a suit on a note and mortgage by one to whom they have been assigned, not by indorsement, but by a separate instrument, the assignor should be made a defendant, to answer as to the assignment; and if he be not made a party, the defect may be reached by demurrer assigning a defect of parties defendants, but not by demurrer assigning want of sufficient facts. *Strong v. Downing*.....300

PARTNERSHIP.

1. *Sale of Partner's Interest to his Copartners.*—*Partnership Debts.*—One of a firm composed of two partners sold his interest in the partnership to his copartner, the contract of sale not containing any provision that the buyer should pay the debts of the firm, or that the seller should receive any certain sum, but it being stipulated in said contract that the seller was to be paid in notes and accounts belonging to the firm, and for any excess due him over and above said notes and accounts the buyer was to execute his promissory notes to the seller. *Held*, in an action by the seller against the buyer for the failure of the latter to perform his part of the contract, that the facts that, at the time of the sale, the firm was indebted in a sum greater than its entire assets, and that said indebtedness had been paid by the defendant, constituted a good defense. *Coffin v. Mitchell*.....293
2. *Rights of Partners Between Themselves.*—*Shares of Stock.*—*Settlement upon Dissolution.*—*Pleading.*—A., B., and C. became partners, under an agreement by which they were to contribute equally to the capital stock, which was to be a certain amount. A. and B. contributed their full shares, and C. contributed one-half of his share and was to contribute the other half in one year. The firm purchased real estate, machinery, and materials, and engaged in business. The part-

nership was dissolved before the expiration of one year by the death of A., and, by consent of all the parties in interest, B. closed up the business, after the expiration of one year from the commencement of the partnership. The partnership liabilities were all paid out of the personal assets of the firm, without resort to said real estate. B., C., and the heir of A. sold said real estate, each separately selling one-third thereof and receiving for himself the consideration of the sale of such interest. In a suit by B. against C. and the administrator of the estate of A. to compel an accounting and settlement of the partnership affairs, and to obtain distribution, C. not having paid in more than his said one-half of his share of the capital stock;

Held, that the complaint was not bad on demurrer for failing to set forth and account for the purchase-money received by the partners upon their several sales of said real estate, or because the plaintiff did not therein offer to account for the consideration of his sale of one-third of said land.

Held, also, that C. was not entitled to share equally with his copartners in the profits or assets of the partnership without contributing his full share of the capital stock, and that, therefore, in such adjustment the balance of capital stock unpaid by him should be accounted against him.

Smith v. Hazelton et al......481

PATENT RIGHT.

See **BILLS AND NOTES, 5; CONSIDERATION, 1.**

PLEADING.

See **ARBITRATION AND AWARD, 3; CITY, 1, 6; CONSIDERATION, 2; CORPORATION, 1, 2; DECEDENTS' ESTATES, 1, 2; DEMURRER; DIVORCE, 3; EVIDENCE, 8; FRAUD, 3; JURISDICTION, 4, 5, 7; MINOR, 1; MORTGAGE, 3; PRACTICE, 7, 8; PRINCIPAL AND SURETY, 3, 6; RAILROAD, 8; REPLEVIN, 2; RES ADJUDICATA; SUNDAY; TENDER; TOWNSHIP TRUSTEE; UNSOUND MIND, 3; VENDOR AND PURCHASER, 8.**

1. *Fraud*.—Fraud cannot be pleaded without stating the facts constituting it. *Ham v. Greve et al.*.....18

2. *Implied Promise*.—Under our code, where a complaint for use and occupation of real estate alleges facts from which the law will infallibly imply a promise to pay for such use and occupation, it is not necessary that it should allege a promise or an indebtedness. *Wills v. Wills*....106

3. *Fraud*.—*Promissory Note*.—Suit by the president and trustees of a university on promissory notes executed by the defendant to the plaintiff. Answer, that the notes were given upon the representation of the plaintiff's agent to the defendant, that, by the execution of the notes, he would become entitled to a perpetual scholarship in said university, and be entitled to send a scholar to said university free of further cost or charge of any kind; that the officers of said school were prepared to furnish employment to all pupils, by which they could pay their board and all other expenses; that the school was conducted on such a plan that the cost of the scholarship was all that was required to be paid by its patrons; that the school was the best in the State; that its professors and teachers were as competent as those of any other institution of learning in the State; that the school buildings were in good repair, and fitted up with a view to the health, comfort, and convenience of the scholars; that the society of the neighborhood was of the highest moral character; that the grounds and lands belonging to the school and adjoining its buildings were under a high state of cultivation and improvement; that the students were constantly under the care and charge of the officers and teachers of the school, and furnished with boarding on the premises; that the table of the boarding department was constantly supplied with a sufficient amount of wholesome and nutritious food; that every care was taken to preserve the health and elevate the morals of the students, and render their school life pleasant and homelike; and it was alleged that the school was organized and conducted under the control of a certain religious organization, of which said agent was a preacher and the defendant a member; that defendant could not read or write; that relying on the repre-

sentations of said agent, and placing confidence in him as a minister of the gospel, and believing in his honesty and integrity, the defendant was induced by such representations to sign said notes, and did so solely in consequence thereof; and that said representations were false and fraudulent.

Held, that the answer was good on demurrer.

Held, also, that the facts that a certificate for the scholarship was to be issued to the maker of said notes, and that this had not been done, could not constitute a defense to a suit on the notes.

Held, also, that an answer alleging that the plaintiff falsely and fraudulently represented to the defendant that he should not be required to pay the principal of the notes, but only the interest thereon, was bad on demurrer. *Beaver v. The President and Trustees of Hartsville Univ.*.....245

4. *Consideration*.—It is a good answer to a suit on a promissory note, by the payee against the maker, that it was executed without any consideration.....*Ibid*.

5. *Abatement*.—*Another Action Pending*.—*Appeal*.—In a suit against the board of county commissioners, for medical services rendered by the plaintiff to the poor of a certain township upon the employment of the township trustee, an answer setting up the fact that the plaintiff has presented said claim to said board for allowance and has appealed from the decision of the board thereon, and that the appeal is still pending, must show the perfecting of such appeal according to the statute. Such an answer, and also an answer that said claim has been presented by the plaintiff to said board for allowance and is still pending before the board, are answers in abatement, and must be verified by affidavit. *Comm'rs of Morgan Co. v. Holman et al.*.....256

6. *Counter Claim*.—Suit on an account for advancements made by the plaintiff as factor of the defendant, upon a quantity of leather consigned by the plaintiff to the defendant for sale. Answer, that the plaintiff was acting as factor of the defendant, and as such had in his possession a certain large quantity of the defendant's leather

of a certain value; that before that time the plaintiff had been instructed by the defendant not to sell said leather for less than thirty cents per pound over and above all costs and charges; but that in violation of such instruction, the plaintiff sold said leather for thirty cents per pound, subject to all costs and charges, wherefore the price of the leather was reduced to twenty cents per pound, above costs and charges; and the answer claimed damages in a certain sum as a counter claim, asking judgment, &c.

Held, that the answer set up a good counter claim. *Mooney et al v. Musser et al.*.....373

7. *Consideration*.—To show a consideration for an agreement, in a pleading, it is not sufficient to allege that the agreement was for a valuable consideration; but the facts with reference to the consideration must be set out. *Brush v. Raney*.....416

8. *Promissory Note, Without Date*.—In a suit on a promissory note without date, but having seven months from its execution to run, the complaint set forth the note and alleged that it was made at a certain date, being more than seven months prior to the commencement of the action.

Held, that the complaint sufficiently showed that the note was due when the suit was commenced.....*Ibid*.

9. *Written Instrument*.—In a suit on a promissory note executed by the defendant to the husband of the plaintiff, the complaint alleged that said husband died testate; that by his will he gave to the plaintiff all his estate after the payment of the debts; that the estate had been finally settled by the executor, leaving said note as a part of the property bequeathed to her.

Held, that the complaint was not insufficient because said will or a copy thereof was not filed with it. *Nelson v. Myers*.....431

10. *Matters of Law*. A paragraph of answer in which the defendant pleads matter of law merely, should be stricken out on motion of the plaintiff. *Harves et al. v. Coombs et al.*455

POOR.

See PLEADING, 5.

Physician.—Where medical services are rendered by a physician to persons as poor persons of a township in pursuance of an employment by the proper township trustee, such employment, in the absence of fraud or collusion, is conclusive in a suit to enforce the collection of the claim against the county for such services, without regard to the question whether such persons were properly entitled to such services under the poor laws or not. *Comm'rs of Morgan Co. v. Holman et al.*.....256

PRACTICE.

See APPEAL; ATTORNEY; DAMAGES, 2; GUARDIAN AND WARD, 1; INTERROGATORIES; JUDGMENT; JUSTICE OF THE PEACE; NEW TRIAL; PARTIES; SPECIAL FINDING; SUPREME COURT; VENUE; VERDICT.

1. **Demurrer.**—A demurrer to an entire pleading should be overruled if such pleading contain any good paragraph. *Heavenridge v. Mondy*....28
2. **Misjoinder of Causes.**—The joinder of a cause of action sounding in tort with one sounding in contract is, under the code, good ground for a demurrer assigning a misjoinder of causes of action; and where such a demurrer to a complaint has been properly sustained, the plaintiff can not successfully complain in the Supreme Court of the action of the court below in thereupon rendering judgment against him for costs, where he merely excepted to the ruling on the demurrer, but interposed no objection to the judgment, and took no step for a separation of the causes. *Boyer v. Tiedeman*72
3. **Interrogatories.**—The answers made by a party under oath to interrogatories propounded by the opposite party, as provided by section 303 of the code (2. G. & H. 189), cannot be used by the court on a motion to strike out a pleading as a sham which is good on its face. Such answers can be used only on the trial, and then only at the option of the party who has required them. *Bogges v. Davis*.....82
4. **Suit on Joint Contract.**—**Judgment.**—**Motion to Set Aside Judgment.**—In an action against A., B.,

and C. on their joint note, all the defendants having appeared, A. and B. were defaulted; whereupon, without any issue of fact as to C. or further notice of him than overruling a demurrer filed by him to the complaint, final judgment was taken against A. and B. alone, on their default. Afterwards, during the term, A. and B. appeared and made a motion in writing to set aside the default and judgment, assigning therein as cause, that the proceeding of the court in rendering final judgment against them was irregular and contrary to law; and they stated verbally to the court (as shown by bill of exceptions) the particulars of the irregularity and illegality of the proceeding.

Held, that the judgment against A. and B. was erroneous.

Held, also, that the objection to the judgment was sufficiently brought to the attention of the court. In such case the motion need not be in writing. *Mullendore et al. v. Silvers et al.*.....98

- 5. **Motion Embracing Independent Matters.**—Where a motion to set aside a default and the judgment rendered thereupon is well taken as to the judgment, but not as to the default, it should be sustained as to the judgment and overruled as to the default only.....*Ibid.*
- 6. **New Trial.**—**Weight of Evidence.** When a verdict is not sustained by sufficient evidence, it is the duty of the court trying the cause to grant a new trial upon motion assigning that cause; but the Supreme Court will not reverse the ruling of the court below in refusing to grant a new trial on such ground, unless it appears, not merely that the finding was contrary to the weight of the evidence, but that it was wrong beyond any question whatever. *Evans, Adm'x, v. Newland*112
- 7. **Appeal.**—**Pleading Stricken Out.** Where a pleading has been erroneously stricken out, the error is not available on appeal if the same matter has been incorporated in an amended pleading afterwards filed and not rejected. *Irvinson et ux. v. Van Riper*.....148
- 8. **Waiver.**—**Demurrer.**—**Reply.**—Where a defendant voluntarily goes to trial without having made any

- question as to the state of the pleadings, he thereby waives the decision of the court upon a demurrer filed to a paragraph of his answer and undecided, and waives a reply not filed which otherwise might have been required *Ibid.*
9. *Judgment Taken Through Mistake, &c.*—Where proper cause is shown for relief from a judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect, under the act of March 4th, 1867, (3 Stat. 373) it is not in the discretion of the court to refuse the relief. *Phelps v. Osgood*.....150
10. *Same.*—*Affidavit.*—A cause at issue was called for trial, and neither the defendant nor his attorneys appearing, the default of the defendant was entered, and the cause was submitted to the court for trial. Finding and judgment for the plaintiff. Four days afterwards, during the same term, the defendant moved to set aside the default and judgment, and for a new trial, and filed in support of the motion the affidavit of one of his attorneys, who stated therein, that he was one of the attorneys of the defendant, naming another attorney as his associate counsel, that private business of his own required the absence of himself and his associate counsel, unexpectedly, in an adjoining county named, on Monday and Tuesday of that week; that the fact that this cause was set in the causes to be reached on one of these days, "owing to the confusion occasioned by the accident at the fair grounds," had escaped his observation; and it became necessary for him to start so early on Monday morning that he had no opportunity to see and engage some member of the bar to look after his cases generally in his absence; and hence he left himself and his client wholly unrepresented in this case on these two days; that from an examination of the facts in the case, affiant believed that the defendant had a good defense to at least a part of the cause of action, if not to the whole; that it was not by the fault of the defendant that the default was taken, but it was the affiant's fault if any one's, and was the result of circumstances he could not control.
- Held*, that the affidavit was insufficient. *Ibid.*
11. *Production and Inspection of Writings.*—There is no error in refusing to grant an order, at the request of a party, requiring the adverse party, a corporation, to produce its record books for inspection and use on the trial, where the books are at a considerable distance from the court, and it is not shown by affidavit that there are any entries in them which would afford material evidence, or that any request has been made for copies of such entries, if there be any such. *Beaver v. The Prest. and Trustees of Hartsville Univ.*.....245
12. *Open and Close.*—Whenever it devolves upon the plaintiff to make any proof as to the facts necessary to make out his case, or as to the amount which he ought to recover, he has the right to open and close the evidence and the argument. *Fellers v. The Muncie Nat'l Bank*.....251
13. *Demurrer.*—*By Several Parties.* A joint demurrer by two or more defendants to a complaint should be overruled as to all of them if the complaint be good as to any of them. *Skeen et ux. v. Muir et al.*.....310
14. *Interrogatories to Jury—Withdrawal of.*—Where particular questions of fact pertinent to the issues and not liable to be rejected as a whole on account of any objection to the character of the interrogatories in which they are embraced have been submitted to the jury, at the request of a party, and without objection from the adverse party, with the proper instruction to the jury in reference to finding thereon, and the jury has retired to consult upon the verdict, the court cannot withdraw said interrogatories from the jury over the objection of the party at whose request they were submitted, on the ground that the court was asked to require the jury to answer them unconditionally, and not upon the condition that they should render a general verdict. *The Otter Creek Block Coal Co. v. Raney*.....329
15. *Bill of Exceptions.*—*Affidavit.*—An affidavit in support of a motion to dismiss an action cannot be made a part of the record except by a bill of exceptions. *Rosenbaum et al. v. McThomas*.....331

16. *Amendment.—Entry Nunc Pro Tunc.—Guardian's Sale.*—Motion in the court of common pleas by a guardian for an entry *nunc pro tunc*, after five years, in the record of a proceeding brought by him in said court for the sale of certain real estate of his ward, so that said record would show the filing of an additional bond by the guardian, the order of sale, the deed, and approval thereof, these portions of the proceeding not being shown by the record. On appeal, the Supreme Court, upon the evidence, showing contemporaneous data, consisting of papers in the case, by which to amend the record in these particulars, ordered the court below to make said entry. *Uland, Guard., v. Carter et al.*...344
17. *Same.*—On such a motion the court cannot decide upon the validity of the title under such guardian's sale, but can only order the entry to be made, or refuse it.....*Ibid.*
18. *Open and Close.*—Where in an action on a promissory note the general denial is pleaded in answer, the plaintiff has the right to open and close. *Jarboe et al. v. Scherb*...350
19. *Exception.—Form of.—Written and Oral Instructions.*—On the trial of a cause, the court was requested, at the proper time, by the defendant, to charge the jury in writing, but disregarding the request, gave, with certain written instructions, certain verbal explanations thereof and verbal instructions. No objection was made at the time the instructions and explanations were being given, but after they had been given, and the bailiff had been sworn to take charge of the jury, and before the jury retired, the defendant's attorney stated that he excepted to the instructions; and when asked to specify which instructions he excepted to, he said he excepted to all, and that all included each. *Held*, that this exception was sufficiently specific to raise the question of the giving of the verbal instructions and explanations in disregard of the defendant's request. *Held*, also, that such disregard of the defendant's request constituted a good ground for a motion by him for a new trial. *Sutherland et al. v. Venard et al.*.....390
20. *Instructions to Jury.—Written. Verbal Explanations.*—Where, upon the trial of a cause by a jury, the court is requested, at the proper time, to instruct the jury in writing, if the court accompanies its instructions with any verbal explanations, comments, and remarks, though not inconsistent with the law as set forth in the written instructions and in no way rehearsing the evidence, this will constitute a good cause for granting a new trial, on the motion of the party making such request. *Meredith v. Crawford*.....399
21. *Relief from Judgment Taken Through Mistake.*—A proceeding to correct an alleged mistake in a partition suit must be commenced within two years after final judgment in the partition suit. *Temple et al. v. Irvin et al.*.....412
22. *Same.—Commencement of Suit.* The commencement of a suit or the institution of proceedings on motion includes the issuing of process or notice to bring the defendant into court. *Ibid.*
23. *County Commissioners.—Appeal. Docketing Appeal.—Trial.*—On an appeal by one to the circuit court from an order of the board of county commissioners allowing a claim filed by another before said board, the cause should be docketed in the circuit court in the names of the claimant and appellant, the former as plaintiff and the latter as defendant, and should be tried in the circuit court *de novo*; and if on the trial no evidence be offered, the appeal should not be dismissed, but the cause should be decided, on the merits, for the appellant. *Ralston v. Radcliff*.....513
24. *Default.—Motion to Set Aside.—Rule of Court.*—Judgment having been rendered by the court of common pleas against the defendant in a suit on a promissory note, he moved that the default be set aside, and that he be allowed to answer, on the ground (disclosed by his affidavit and that of his attorney) that the attorneys for the parties had agreed by parol, out of court, that there should be a judgment for the plaintiff, by default, but that it had been taken for a larger sum than that mentioned in said agreement. A rule of said court provided that admissions or agreements about the proceedings in

a cause would not be enforced, or the time of the court be permitted to be used in discussing them, unless in writing, or made of record, or in presence of the court.

Held, that under said rule and the statute, 2 G. & H. 328, sec. 772, there was no error in overruling said motion. *Barnes et al. v. Smith*.....516

25. *Amendment.—Demand of Judgment.*—In said cause, at or after said default, the complaint was amended so as to claim a larger sum as the amount of the judgment. The amount of the judgment taken was authorized by the terms of the note in suit. Motion by the defendant, which was overruled, to strike out the larger sum and restore the smaller, the defendant's attorney, in an affidavit filed by him in support of said motion, stating his belief that the alteration had been made without leave of court.

Held, that it was immaterial in the Supreme Court whether said amendment was made or not in the court below*Ibid.*

26. *Harmless Error.—Instruction to Jury.*—A judgment will not be reversed because of an erroneous instruction to the jury, where it is clear that such instruction has done no injury. *Wallace v. Cravens*.....534

PRINCIPAL AND AGENT.

See EVIDENCE, 6; PLEADING, 6.

PRINCIPAL AND SURETY.

See EXECUTOR AND ADMINISTRATOR, 2.

1. Where one is about to take a note, with surety, from a person whom he knows to be insolvent, the mere fact that the creditor does not, voluntarily and without solicitation, announce to the proposed surety the insolvency of the principal, will not release the surety. *Ham v. Greve et al.*.....18

2. *Misapplication of Promissory Note.* Where one is induced to sign a note as surety, by the representation, made to him for the purpose of so inducing him by the payee, that the note is to be used in payment for goods to be furnished by the payee to the maker, and the note is used to pay a pre-existing debt of the maker

to the payee, the person so signing is not bound as surety.....*Ibid.*

3. *Same.—Pleading.—Evidence.*—Suit on a promissory note by the payee. Answer by surety, that prior to the execution of the note, the maker was the proprietor of a retail furniture store, which, including the stock, had been sold to him by this defendant, to whom the maker was indebted therefor in a certain sum, and that it had been agreed between said maker and this defendant that the latter should hold a lien on said stock and all additions thereto, to secure said indebtedness, and that said maker was to execute a mortgage on the same for that purpose; that the payee, who was a wholesale furniture dealer in the same place, knew of said indebtedness, and, intending to deceive this defendant and induce him to sign the note as surety, represented to him that said maker was doing a good business and getting along well, but needed more stock, and that the payee would furnish him some more goods, if this defendant would become surety on his note for the same; that this defendant, relying on said statements, and in consideration of the fact that said goods were to be added to the stock, thus augmenting his security, became surety on said note, believing at the time that the note was given for goods furnished by the payee to the maker as aforesaid, whereas the payee did not furnish the maker any goods, but the whole consideration of the note on the part of the maker was a prior indebtedness of the maker to the payee, of which fact the surety was at the time ignorant; that the maker was at the time insolvent, and was not prospering in his business, as the payee well knew; that the maker had never paid his indebtedness to the surety, who never received any consideration for his signature to the note.

Held, that the allegations as to said indebtedness of the maker to the surety, and the agreement between them as to the lien and the execution of a mortgage, did not add anything to the legal effect of the other matters stated, and there was therefore no error in refusing to admit under this answer evidence in relation to the

agreement to execute the mortgage. *Held*, also, that evidence as to the insolvency of the maker, at the time of the interview between the payee and the surety and the execution of the note, was not admissible under this answer.

Held, also, that the facts set forth by the answer were sufficient to release the surety.

Held, also, that if at the time the surety signed the note he was told by the maker that it was to be used in payment of a prior debt of the maker to the payee, and if it was so used, then the surety would be liable, notwithstanding the payee had represented to the surety that it was to be used in payment for goods, as alleged in said answer *Ibid*.

4. *County Clerk. — Tender.* — The sureties upon the official bond of a clerk of the circuit court are not liable for money paid into open court and handed to the clerk with an answer of tender and for the purpose of keeping the tender good, and for which the clerk as such gives his receipt, there being no order of the court in reference to the money. *Carey et al. v. The State, ex rel. Farley* 105

5. *Mutual Sureties.* — Where a promissory note is executed by two persons, the consideration going one-half to each of them, as between themselves each may be treated as principal for one-half of the debt and surety of the other for the other half. *Hall v. Hall et al* 314

6. *Contract. — Pleading. — Evidence.* A promissory note was executed by A. and B., the latter styling himself "collateral security." Suit on the note by the payee against B., A. being deceased.

Held, that a parol agreement between the payee and B. that the latter should pay the note only in case it could not be made of A., if contemporaneous with the making of the note, could not be shown in defense, because of the rule against the admission of parol evidence to vary or contradict a written instrument, and if subsequent to the note, could not be sustained without a consideration therefor being shown. *Brush v. Raney* 416

7. *Statute Construed.* — The statute

(2 G. & H. 308, sec. 674) which enables a surety to have an order of the court that execution shall be first levied upon the property of his principal, is not applicable in such an action brought against a single defendant *Ibid*.

PROMISSORY NOTE.

See **BILLS AND NOTES.**

PROSECUTING ATTORNEY.

See **OFFICE AND OFFICER, 1, 2.**

R

RAILROAD.

See **CITY, 7 to 11.**

1. *Injury to Animals. — Damages.* — Where an animal is so badly injured by a passing train of cars upon a railroad track that it must soon die from the injury, and the railroad company is liable therefor to the owner of the animal by reason of its track not being securely fenced, and the owner kills the animal, but receives no benefit from it after the injury, evidence of the value of the animal after the injury is not admissible for the purpose of reducing the damages. *The Indianapolis, &c., R. R. Co. v. Mustard* 50

2. *Subscription of Railroad Stock by County.* — By the general grant of legislative power, the General Assembly of this State is empowered to authorize counties to subscribe for stock in railroad companies, and section 6 of article 10 of the constitution recognizes this power, and so limits it as to prevent such subscription unless the stock be paid for in money at the time of the subscription. A county cannot subscribe for such stock without appropriate affirmative legislation authorizing it. *The Lafayette, &c., R. R. Co. v. Geiger* 185

3. *Same. — Act of 1869.* — The authority granted by the Act of May 12th, 1869 (Acts 1869, p. 92), to counties to subscribe for stock in railroad companies, to be paid for at the time of the subscription, is a legitimate exercise of the power conferred on the legislature by section 1 of article

- 5 and section 6 of article 10 of the constitution; and the means provided in said act to raise the money with which to pay for said stock are appropriate, plainly conducive to the end proposed, and not prohibited by the constitution or inconsistent with the letter or spirit thereof.....*Ibid.*
4. *Same.—“Taking Effect.”*—The fact that a vote of the people is necessary to carry the provisions of said act of 1869 into execution, does not render the taking effect of the act dependent upon any authority other than the legislative power of the General Assembly, and therefore does not render the act in conflict with section 25 of article 1 of the constitution..... *Ibid.*
 5. *Same.—General and Local Laws. County Commissioners.*—Said act is not in conflict with the constitutional restriction upon the enactment of local or special laws; and it is in accord with the provision of the constitution authorizing the legislature to confer upon county boards powers of a local administrative character..*Ibid.*
 6. *Same.—Rate of Assessment and Taxation.*—Said act is not in conflict with the constitutional requirement that “the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation,” the rate in each county in which an appropriation is made under said act being uniform and equal throughout such county.....*Ibid.*
 7. *Election.—Change of Voting Places. Inspector’s Return.—Notice of Election.*—An election under said act, resulting in favor of the making of an appropriation by a county in aid of the construction of a certain railroad, there being no fraud, no legal voter being prevented from voting, and no illegal voter being permitted to vote, it was *held*, was not rendered illegal by the facts that the county commissioners changed the place of voting, in one of the townships, two days before such election, of which change no notice was given to the voters; that the inspectors in two of the townships made no return of the votes taken therein, where, if the whole number of votes in said townships had been cast against the appropriation, there would still have been a clear majority of all the votes cast in the county in favor of the appropriation; and that the question submitted to the voters of the county was for or against a subscription of stock in said railroad by said county, a resolution adopted by the commissioners when they ordered a vote to be taken being published in the election notice, to the effect that if the vote of the county should be in favor of an appropriation, they would subscribe for stock in said railroad company, for and on behalf of said county, and the question of *donating* money to aid in the construction of said railroad not being submitted in said notice.....*Ibid.*
 8. *Injury to Animals.—Pleading.*—A complaint in an action commenced before a justice of the peace against a railroad company, to recover for the killing or injuring of an animal by a passing train of cars, must either contain an allegation of negligence on the part of those in charge of the train, or aver that the road was not fenced, and must allege that the train belonged to said company or was being run over its road. *The Toledo, &c., R. W. Co. v. Weaver*.....298
 9. *Same.—Statute Construed.—City.* The statute making railroad companies liable for injuries to animals without regard to willful misconduct, negligence, or accident, where the railroad is not fenced, applies to a place within the limits of a city where it would not be illegal or improper to maintain a fence. *The J., M., & I. R. R. Co. v. Parkhurst*.....501
 10. *Same.—Evidence.—City.*—In an action against a railroad company to recover damages for the killing of stock by a passing train, the court instructed the jury, 1, that to enable a person to recover under said statute he must show that the place where the animal went upon the railroad was at a point where the railroad company was bound to fence the road, and that the road was not fenced at said point; or that the company was bound to maintain a cattle-guard at said place, and that such guard was not in proper condition to keep stock off the railroad; 2, that said statute does not apply to the crossing of a public street or alley in a city, or a place within a city where from the necessary use of the grounds

it would be unlawful or unreasonable to require the railroad company to maintain a fence; 3, that a railroad company is not bound under said statute to erect and maintain cattle-guards at the crossings of public streets and alleys within the corporate limits of a city, or to fence the lots lying on either side of the railroad track between such crossings; but beyond such crossings the company is bound to maintain fences and guards, the same as outside the corporation.

Held, that the defendant could not complain of these instructions.....*Ibid*.

11. *Contract. — Construction. — Subscription of Donation to Railroad.*—

Suit to recover a certain amount subscribed by the defendant as a donation to aid in the construction of a railroad, the contract of subscription on which the suit was brought, dated March 18th, 1865, providing that the subscribers thereto agreed to pay to A., or his assigns, the sums placed opposite their names, provided that A., or his assigns, should construct, or cause to be constructed, a railroad from Indianapolis to Danville, Illinois, by way of Brownsburg, Jamestown, Crawfordsville, and Covington, Indiana, to be located and established within one-fourth of a mile of Brownsburg, said sums to be paid when A., or his assigns, should have completed said railroad from Indianapolis to Crawfordsville, and should have regular trains of cars running through by way of Brownsburg. A. assigned said subscriptions to a certain railroad company, May 16th, 1866, by a writing wherein he stated that, having abandoned the construction of said railroad, and having the written request of a large majority of the committee with whom he had been in negotiation in relation to said road, by whom said donations were placed in his hands, to assign the same to said railroad company, he, in pursuance of said request, for value received, assigned, &c., said subscriptions to said railroad company. In May, 1869, said subscriptions were assigned in writing by said company to the plaintiffs, who in their complaint alleged the foregoing, and that they, in pursuance of said contract, located, established, and

constructed said railroad from Indianapolis to Crawfordsville, by way of Brownsburg and within one-fourth of a mile thereof, and by way of Jamestown, and were rapidly completing it from Crawfordsville to Danville, Illinois, by way of Covington, and since the 9th of May, 1869, had had regular trains of cars on said road from Indianapolis to Crawfordsville, of which defendant had notice, and that they as such assigns had performed all the stipulations of said contract, &c.

Held, on demurrer to said complaint, that it was not essential under said contract that said road should be constructed by A. only, but that his assignee could be substituted in the place of A. and by performance entitle himself to the sum subscribed.

Held, also, that the statement in the assignment of A., that he had abandoned the construction of the road, could not prevent a recovery by his assignee.

Held, also, that if the defendant's proposition to pay said sum might have been withdrawn before formal acceptance thereof or the construction of the road, yet as it was not withdrawn, and the work was completed as alleged, it was not necessary to allege such acceptance in the complaint.

Held, also, that, no time for the completion of the road being specified, a reasonable time must be allowed, and that upon demurrer to the complaint it could not be held that there had been unreasonable delay. *Smith et al. v. Hollett*519

REDEMPTION.

See MORTGAGE, 4, 5; SHERIFF'S SALE, 1, 2.

REHEARING.

See SUPREME COURT, 1, 27.

REPLEVIN.

1. *Affidavit.—Justice of the Peace.*—

In an action of replevin before a justice of the peace, though the complaint need not be separate from the affidavit, it may be; and where the defendant appears to the action and

goes to trial on the merits, without objecting to the affidavit or the writ issued thereon, he cannot, on appeal to the court of common pleas, raise any objection to the affidavit as such, or to the writ *Eddy v. Beal*.....159

2. *Same. — Pleading.* — It seems that in an action of replevin before a justice of the peace, there is no necessity for the plaintiff's affidavit as such to state that he claims a judgment for the possession of the property, or that he demands damages for the detention thereof, though these statements will not vitiate the affidavit; and that the action of replevin may be maintained without asking damages for the detention of the property.....*Ibid.*

3. *Justice of the Peace. — Bond.* — In an action of replevin commenced before a justice of the peace, if the bond filed by the plaintiff be for a sum less than double the value of the goods as stated in the verified complaint, the justice has no jurisdiction of the action; and on appeal to the court of common pleas such defect of the bond constitutes good ground for a motion by the defendant to dismiss the action, or to arrest the judgment. *Deardorf v. Ulmer*.....353

REPLY.

See PRACTICE, 8.

RES ADJUDICATA.

Pleading. — Suit on a note governed by the law merchant, by an indorsee against the maker. Answer, setting up that the note was obtained by the payee from the maker by fraud, and that the plaintiff had notice thereof. Supplemental reply, that in a cause pending in the same court, wherein the same persons were parties, founded on a promissory note given by the same maker, payable to the same payee, given at the same time and as a part of the same consideration, and upon the same transaction, and for the same purpose, and indorsed to the plaintiff by the same indorser, at the same time and upon the same consideration as the note sued on in this case, issue was formed between the parties, in which the defendant set up, in effect, the same defense as

in this suit, and the plaintiff pleaded, in effect, the same replies, and said cause was submitted to the finding and verdict of a jury on final hearing and trial, and the jury found for the plaintiff, and the court rendered judgment on the verdict; a copy of the record in said former suit being made part of this reply, the allegations of which it sustained.

Held, that this reply was good on demurrer. *Hereth et al. v. Yandes*..102

RESCISSION.

An application for the rescission of a contract is addressed to the discretion of the court, and will not be granted when the parties cannot be placed *in statu quo*. When one seeking to rescind has derived benefit under the contract, he must reconvey, refund or give to the other party all such benefit. If he has had the valuable use of property, he must offer to account for this profit. And it must affirmatively appear that he has acted promptly in availing himself of his right to rescind. *Hanna et al. v. Shields*84

RULE OF COURT.

See PRACTICE, 24; SUPREME COURT, 2, 28.

See HILBORN v. DIBBLE. 519.

S

SALE.

See CUSTOM, 1; SHERIFF'S SALE; UNSOUND MIND, 2.

Delivery. — Bill of Lading. — A. purchased a quantity of flour to be manufactured by a certain mill in St. Louis, Mo., and a parol agreement was made by A. and B. for the sale of the flour by the former to the latter for cash on delivery. Afterwards a freight company, which owned no means of transportation, gave B. an instrument styled a bill of lading, dated before the flour had been manufactured, by which said company acknowledged the receipt by it of the flour from B. and agreed to transport it to C. at Boston, Mass. A few days afterwards the servants of a transfer

company, an organization engaged in carrying freights across the river at St. Louis, took the flour from said mill, conveyed it across the river, and put it in the custody of a railroad company for which said freight company acted as agent, receiving a certain percentage for all freights obtained for said railroad, said transfer company giving the superintendent of said mill dray tickets for the flour, and receiving from said railroad company a bill of lading for the flour to be delivered to C. at Boston. The barrels had been marked at the mill with B.'s brand without the knowledge of A. Before the flour was taken from the mill B. drew on C. for a certain amount payable to the order of the former, chargeable to account of the flour, and for value sold the bill of exchange to a bank and transferred to said bank the instrument so given by said freight company to B., the bank having no notice of any claim on the flour in favor of A. Hearing of the embarrassment of B., who a few days afterwards became insolvent, A inquired of the superintendent of the mill about the flour, received from him said dray tickets, and the day after the delivery of the flour to the railroad company went with said tickets and a bill for the flour to B. and requested payment, which not being made, A. told B. that he would keep the tickets and make other disposition of the flour, and went to the railroad company with said tickets and demanded a bill of lading, which was refused. No order, oral or written, was given by A. for the delivery of the flour from the mill, but the agents of the transfer company received their orders from the agent of said freight company, who received his authority from B.

Held, that A. was still the owner of the flour and entitled to its possession.

Held, also, that said instrument given by said freight company to B. could not be regarded as a bill of lading. *The Union R. R. and Transp'n Co. et al. v. Yeager et al.*.....1

SCIRE FACIAS.

See JUDGMENT, 1.

SET-OFF.

See MINOR, 3.

SHERIFF'S SALE.

1. *Redemption.—Lien of Judgment.* Where land sold on execution for less than the amount of the judgment on which such execution was issued is redeemed by the judgment defendant, under the act of 1861 (2 G. & H. 251), the priority of the lien of said judgment for the remainder of the amount thereof over other judgment liens continues as if such sale had not been made. *The State, ex rel. Allen, v. Sherill*.....57
2. *Redemption Law of 1861.*—The redemption law of June 4th, 1861 (2 G. & H. 251), does not cut off or affect any right of redemption existing by the general principles of law and held by one not a party to the judgment, decree, or other judicial proceeding on which a sale of real estate has been made. *Holmes et al. v. Bybee et al.*.....262

SOLDIERS.

Bounties.—Under a call of the President for volunteer soldiers, the board of commissioners of a county by an order agreed to pay a certain bounty to each of a certain number of men, or as many as might be necessary to free the county from a draft under said call, providing that the *bona fide* citizens of the county were "to have the preference before outsiders" were paid. And it was provided that said bounty should be paid by the treasurer upon the order of the county auditor, to be issued when the volunteer should have been mustered into the service of the United States; and that the certificate of the mustering-in officer should be sufficient evidence to authorize the auditor to issue the order.

Held, that where a person, on the faith of this promise, enlisted, was mustered into the service, and was credited to a certain township of said county, and thereby filled said quota and discharged said county from said draft to the extent of one man, he thereby became entitled to said bounty.

Held, also, that said certificate of the mustering-in officer was merely evidence, the presentation of which to the auditor was necessary to authorize him to audit and allow the claim and issue his warrant on the treasurer for the amount thereof, but not necessary to confer the right to the bounty.

Held, also, that where the auditor refused to issue said warrant upon presentation by said volunteer, before said quota had been filled and before all the bounties provided for had been paid to other parties, of a certificate of the mustering-in officer showing the muster in of said volunteer, but not showing that he was accredited to said county, and said commissioners afterwards refused to pay said bounty upon request of said volunteer, he was entitled to recover the amount of said bounty in a action therefor against said board of commissioners, although he did not present to said auditor a certificate of the mustering-in officer in the form required by said order until after said quota had been filled and after all the bounties provided for in said order had been paid to other volunteers.

Held, also, that said order should be construed to mean that citizens of said county entitled to bounties under said order should be paid before those, who, residing out of the county, enlisted in accordance with said order; and not that the latter class should never be paid. *Bragg et al. v. The B'd of Comm'rs of Rush Co. et al.*.....405

SOLDIERS AND SEAMEN'S HOME.

See PARENT AND CHILD, 2.

SPECIAL FINDING.

1. *Signing. — Bill of Exceptions. —* Where a special finding under section 341 of the code is not signed by the judge or incorporated in a bill of exceptions, the Supreme Court will not review the decision of the court therein on the questions of law involved in the trial, or consider any question with reference to the sufficiency or insufficiency of such special finding to justify the judgment ren-

dered by the court. *Roberts v. Smith*550

2. *Motion for New Trial. —* Where such special finding is in accordance with the statute, the proper method of presenting to the Supreme Court the question of the sufficiency of the finding to justify the judgment is by exception to the decision of the court in its conclusions of law, and not by a motion for a new trial.....*Ibid.*

STAMP.

See EVIDENCE, 1, 9, 10.

STATUTE OF FRAUDS.

See CONTRACT, 6; CONTRIBUTION, 1; VENDOR AND PURCHASER, 8, 9.

STATUTES CONSTRUED.

See CITY, 16; ELECTION, 2; HIGHWAY, 2; PRINCIPAL AND SURETY, 7; UNSOUND MIND, 1.

Interrogatories. See PRACTICE, 3.
New trial, as of right. See NEW TRIAL, 2.

Redemption law of 1861. See SHERIFF'S SALE, 2.

SUNDAY.

Demurrer. — Contract Made on Sunday. — In a suit on a promissory note which appears on its face to have been executed on Sunday, no question as to its invalidity by reason of its execution on that day can be raised by demurrer to the complaint. *Heavenridge v. Monday*.....28

SUPREME COURT.

See DECEDENTS' ESTATES, 2, 3; DIVORCE, 1; EVIDENCE, 5; PRACTICE, 7, 8, 15, 25; SPECIAL FINDING, 1, 2.
See THE I. P. & C. R. Co. v. BOWERS, 480; HILBORN v. DIBBLE, 519.
Title of Cause in. See WILLIAMS v. ALLEN, 551.

1. *Rehearing. —* It is the settled practice of the Supreme Court not to consider on a petition for a rehearing a question not presented and considered on the original hearing of the cause. *Heavenridge v. Monday*....28
2. *Assignment of Errors. —* On appeal

- to the Supreme Court, the assignment of errors must contain the full names of the parties to the appeal, and must be signed by the appellant or his attorney *as such*; otherwise, the appeal will be dismissed. *The State, ex rel. Childers, v. Delano et al.*.....52
3. *Same.—New Trial.—Exclusion of Evidence.*—Where the overruling of a motion for a new trial is not assigned as error, the Supreme Court will not examine a question as to the exclusion of evidence. *Bickle v. Swartz*..... 53
4. *Same.—New Trial.*—Where the overruling of a motion for a new trial is assigned as error, this presents to the Supreme Court all the grounds for a new trial properly set forth in the motion, and said grounds for a new trial need not be specially assigned as errors. *Boulden v. Scircle*.....60
5. *Bill of Exceptions.—Evidence.*—Where a bill of exceptions, although professing to contain all the evidence given in a cause, shows upon its face that this is not true, the Supreme Court will not consider the question of the sufficiency of the evidence. *Ward v. Bateman*.....110
6. *Bill of Particulars.—Striking Out. New Trial.*—The action of the court in striking out parts of a bill of particulars cannot properly be assigned as a cause for a new trial; questions concerning such action of the court should be reserved and presented to the Supreme Court in the same manner as questions in reference to striking out other parts of the pleadings are reserved and presented.....*Ibid.*
7. *Weight of Evidence.*—The Supreme Court will not, upon the weight of evidence, reverse a judgment, where the evidence is strongly conflicting. *Wallace v. Walton*.....147
8. *Transcript.—Certiorari.*—The proper mode of correcting errors and supplying deficiencies in the transcript of a cause in the Supreme Court is by making application to this court and by means of a *certiorari*. *Phelps v. Osgood*.....150
9. *Weight of Evidence.*—The Supreme Court will not, upon the evidence, reverse a finding, where the evidence is conflicting, and consists entirely of the testimony of witnesses who testified in the presence of the court below. *Butt v. The Toledo, Wabash, and Western R. W. Co.*.....162
10. *Bill of Exceptions.—Dismissing Appeal.*—A ruling of the circuit court dismissing an appeal to that court from the decision of the board of county commissioners in a proceeding to change the location of a public highway cannot be presented to the Supreme Court except by a bill of exceptions. *Burntragen v. McDonald*..... 277
11. *Conflicting Evidence.*—The Supreme Court will not reverse a judgment on the evidence, where it is conflicting and consists of the testimony of witnesses who testified in the presence of the lower court. *Bollenbacher v. Able*.....289
12. *Bill of Exceptions.—Striking Cause from Docket.*—The Supreme Court will presume in favor of the action of the court below in striking a cause from its docket, where the ground on which the order was made is not shown by a bill of exceptions. *Carr v. Thomas*.....292
13. *New Trial.—Small Excess of Damages.*—The Supreme Court will not reverse a judgment because of a very small excess of damages. *Hall v. Hall et al.*.....314
14. *Evidence.*—The Supreme Court will not reverse a judgment upon the evidence, where it is conflicting. *The Pitts'g, &c., R. W. Co. v. Hume*...326
15. *Bill of Exceptions.—Motion to Strike Out.*—The action of the court in overruling a motion to strike out a paragraph of a pleading will not be reviewed by the Supreme Court, if the question be not presented by a bill of exceptions. *Clem v. Martin*..... 341
16. *Same.—Objection to Evidence.*—An exception to the admission of evidence over objection cannot be made available in the Supreme Court, if the bill of exceptions do not show that a ground of objection was stated to the court below and what the ground of objection was.....*Ibid.*
17. *Rulings of.*—The inferior courts of this State are bound by the rulings of the Supreme Court until they are overruled by it. *Julian v. Beal*..371
18. *Assignment of Errors.—New Trial.*—Where the overruling of a motion for a new trial is not assigned

- as error, the Supreme Court will not consider any error properly constituting a cause for a new trial, though it be assigned as error. *Tyner et al. v. Adams*.....401
19. *Evidence.—Amount of Recovery.* The Supreme Court will not interfere with the action of the court below upon the question of the amount of recovery, where such amount depends upon a calculation, the data for which, in the evidence, are uncertain and unreliable. *Wilson v. Vance, Administrator*.....440
20. *Objection to Evidence.—Bill of Exceptions.—Motion for New Trial.* An objection to the admission of evidence cannot be made available in the Supreme Court, where it does not appear by a bill of exceptions that the party objecting stated the ground of his objection to the court below, or where the question has not been presented to the court below as a cause in a motion for a new trial. *Sage et al. v. Brown*.....464
21. *Harmless Error.*—The Supreme Court will not reverse a ruling of a lower court upon a minor question of practice, where it is not apparent that an injury has been done by such ruling. *Whitman v. Meissner et al.*.....487
22. *Justice of the Peace.—Demurrer.* On appeal to the Supreme Court from the court of common pleas, in an action commenced before a justice of the peace, no notice will be taken of the ruling of said justice on a demurrer. *The J., M., & I. R. R. Co. v. Parkhurst*.....501
23. *Demurrer.—Amendment.*—Where, a demurrer to a paragraph of a reply having been sustained, the plaintiff, by leave of court, has amended said paragraph, and the cause has been tried with the amended paragraph as a part of the pleadings, no question can be raised in the Supreme Court upon the ruling on said demurrer. *White et al. v. Garretson et al.*...514
24. *Same.—Withdrawal of Pleading.* Where, a demurrer to a paragraph of an answer having been overruled, the defendant, by leave of court, has withdrawn said paragraph before trial, no question can be raised in the Supreme Court upon the ruling on said demurrer.....*Ibid.*
25. *Assignment of Errors.—New Trial.*—Where the overruling of a motion for a new trial is not assigned as error, the Supreme Court will not consider any error in relation to giving or refusing to give instructions to the jury, or to propounding to the jury or withholding therefrom special interrogatories.....*Ibid.*
26. *Assignment of Errors.*—There being no error assigned, upon an appeal to the Supreme Court, for any ruling of the court below on any pleading, or for the refusal to grant a new trial, the judgment was affirmed. *Apple v. Atkinson*.....518
27. *Petition for Rehearing.*—A petition for a rehearing signed by a person not a party, without any designation, prefix, or addition to indicate that he is an attorney for a party, is not entitled to consideration by the Supreme Court.....*Ibid.*
28. *Assignment of Errors.—Names of Parties.—Rule of Court.*—Where on appeal to the Supreme Court, the assignment of errors does not state the names of the parties, the appeal will be dismissed. *Vancleve, Adm'r, v. Boler*.....538
29. *Transcript.—Clerk's Certificate.*—Where on appeal to the Supreme Court, the certificate and seal of the clerk of the court below are wanting to the transcript, the appeal will be dismissed. *Sanford v. Sinton et al.*.....539
30. *New Trial.—Evidence.*—Where there has been no motion for a new trial on account of the insufficiency of the evidence, the Supreme Court will not review the action of the court below upon the facts. *Roberts v. Smith*.....550
31. *Weight of Evidence.*—The Supreme Court will not, upon the weight of the evidence, consisting of the conflicting testimony of witnesses who testified in the presence of the court below, disturb the finding of the latter court. *The O. & M. R. Co. v. Black*.....553
32. *Judgment.—Form of.*—When a judgment erroneously directs the sale of property without relief from valuation laws, an objection on this ground to the form of the judgment cannot be raised for the first time in the Supreme Court. *O'Brien v. Peterman*556

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TAX.

See CITY, 16

TENDER.

See CITY, 1; PRINCIPAL AND SURETY, 4.

Pleading.—An answer, pleaded in form in bar of an action generally, setting up a tender alleged to have been made after the filing of the plaintiff's complaint, without expressly showing that the action had been commenced, though asking judgment for costs only from the time of making the tender, is bad on demurrer. *Ireland v. Montgomery et al.*.....174

TIME.

See CRIMINAL LAW, 1, 2, 3.

TITLE.

See VENDOR AND PURCHASER, 1, 2.

TOWNSHIP.

See JUDICIAL NOTICE, 1.

TOWNSHIP TRUSTEE.

Pleading.—*Suit on Official Bond.*—In an action on the official bond of a township trustee, on the relation of the township, to recover a certain amount of school money belonging to the township, which said trustee had refused to pay over to his successor in office, the complaint failed to allege that said trustee, as such, had received any money which he had not expended according to law, and which he had in his hands when he went out of office.

Held, that for want of such an averment, the complaint was bad on demurrer. *Morback et al. v. The State, ex rel. Jackson Township*.....308

TRUST AND TRUSTEE.

See PARTIES, 1; VENDOR AND PURCHASER, 9.

TURNPIKE.

1. *Injunction.*—*Act of 1867.*—*Assessment.*—Where assessors appointed under the act of March 11th, 1867, providing for assessments on lands to aid in the construction of roads, omitted in the list returned by them any land within one mile and a half of the proposed road, their entire assessment is void, and an injunction will lie to prevent its collection. *Robbins et al. v. The Sand Creek Turnpike Co. et al.*.....461
2. *Same.*—*Parties.*—*Plaintiffs.*—The owners in severalty of separate tracts of land which have been separately assessed to aid in the construction of a road, under said act of 1867, who have no joint interest in said lands, may join as plaintiffs in a suit to enjoin the collection of such assessment because of an illegality thereof which renders it alike void as to all said owners.....*Ibid.*
3. *Act of 1867.*—*Duties of Assessors.*—*Injunction.*—Where assessors appointed under the act of March 11th, 1867 (Acts 1867, p. 167), providing for assessments on lands to aid in the construction of plank, &c., roads, did not list, assess, or appraise the benefits to *all* the lands within one mile and a half of the beginning and end of the proposed road as located; *Held*, that an injunction would lie to prevent the collection of assessments made by such assessors. *The Greencastle, &c., Turnpike Co. et al. v. Albin et al.*.....554

U

UNITED STATES.

Acts of Congress; State Courts. See EVIDENCE, 9, 10.

UNIVERSITY.

Certificate of Scholarship. See CONTRACT, 9.

UNSOUND MIND.

1. *Contract.*—*Statute Construed.*—The statutory provision, that "every contract, sale, or conveyance of any person, while a person of unsound mind, shall be void," 2 G. & H. 575,

sec. 11, is applicable only to a person who has been found to be *non compos mentis* in the manner prescribed by statute. *Wilder et al. v. Weakley's Estate*.....181

2. *Same.—Sale.*—Where goods are sold to a person apparently of sound mind, who is not known by the seller to be otherwise, and who has not been found to be otherwise by a proper proceeding for that purpose, and the contract is fair and *bona fide*, and the purchaser receives and uses the goods, whereby the contract becomes so far executed that the parties cannot be placed *in statu quo*, such contract cannot afterwards be set aside because of the unsoundness of mind of said purchaser at the time of the sale, nor can payment for the goods be refused, either by the alleged lunatic or his representatives.....*Ibid.*
3. *Same.—Pleading.*—In an action to recover the price of goods sold, if, at the time of the sale, the purchaser had been duly found to be of unsound mind by a proper proceeding for that purpose, this fact is matter of defense; and it does not devolve on the plaintiff to allege the contrary in anticipation*Ibid.*

USAGE.

See CUSTOM.

USURY.

See ATTORNEY'S FEES, 1.

V

VENDOR AND PURCHASER.

See FRAUD, 1; MORTGAGE, 6.

1. *Title.—Mortgage.—Foreclosure.*—In a suit on a note and to foreclose a mortgage on real estate executed to secure said note given for unpaid purchase-money of said real estate, an answer, pleaded in bar of the whole cause of action, alleging an entire want of title in the vendor, is bad on demurrer, such want of title being at least no defense to the foreclosure of the mortgage. *Hanna et al. v. Shields*.....84

2. *Same.—Purchase-Money.*—The fact that the vendor of real estate conveyed by warranty deed had a title to only a portion of said real estate at the time of said conveyance by him and has not since acquired a title to the remainder, is not a good defense to an action against the vendee in possession under said deed, to recover unpaid purchase-money.
3. *Incumbrances.—Promissory Note. Assignment.—Consideration.—Estoppel.*—Where, upon the sale and conveyance by warranty deed of real estate, it is agreed by the grantor, the grantee, the surety upon a note not payable in bank, given by said grantee and said surety to said grantor in consideration of said conveyance, and the holder of an outstanding mortgage on said real estate, that said note shall be assigned by the payee to said mortgage creditor, who shall thereupon and in consideration thereof enter satisfaction of said mortgage, and said assignment is made and satisfaction is entered according to said agreement, it will not constitute a good defense to a suit on said note by said assignee against said maker and surety, that the maker, in order to prevent the sale of said real estate on execution, has been compelled to pay off a judgment for a greater sum than the amount of said note, existing, without his knowledge, at the date of said conveyance, and constituting a lien on said real estate junior to said mortgage, and that the grantor is insolvent and a non-resident of the State. *Brewer v. Parker et al.*...172
4. *Injunction.*—Where, the purchaser of real estate having taken from the vendor his agreement to convey the same to said purchaser upon final payment of the purchase-money, and having received possession of the land under the contract, and having given his promissory notes governed by the law merchant to the vendor for the unpaid purchase-money, the vendor sells and assigns said notes before maturity, said real estate cannot be subjected to the payment of a judgment rendered against the vendor, retaining the legal title, after such assignment; and the sale of the land under an execution issued on such judgment will be enjoined at

the suit of said purchaser. *Jackson v. Snell et al*241

5. *Conveyance Without Warranty.*—

Title.—A purchaser of real estate took a quitclaim deed therefor, with notice of a defect in the title, consisting of a misdescription of the land in prior conveyances thereof, and, there being no fraud in the transaction, the vendor, by a separate writing, promised and guaranteed that he would cause said defect to be rectified, without specifying any time within which it should be corrected; whereupon, at the request of the vendor, the vendee executed his promissory note to a third person for the purchase-money.

Held, in a suit on said note, it not appearing that said purchaser had been evicted or had sustained any damage, that the continued existence of said defect constituted no bar to the action, or ground for enjoining its prosecution. *James v. Hays et al*,...272

6. *Title.—Purchase-Money.—Injunction.*—

A suit on a note and to foreclose a mortgage on real estate executed to secure said note will not be enjoined on the ground that the note and mortgage were given for an unpaid balance of the purchase-money of the land mortgaged; that a suit is pending in the proper court, brought by third persons by the procurement of the vendor, who is actively prosecuting the same, to set aside the title of the vendor's grantor as to a part of the land, and to recover said part from the grantee, between whom and the persons prosecuting said suit there is no collusion; that said vendor is a resident of another state, and has no property here except said mortgage, and is reputed to be insolvent; that the vendee in taking the conveyance relied more on the validity of the title than on the covenants in the deed, and had no knowledge of the alleged defect in the title or of facts on which such defect could be predicated; it not appearing that there was any fraud on the part of the vendor in reference to the title, or that he was solvent at the time of making the deed, or that the vendee did not know that he was insolvent and a non-resident at that time. *Strong v. Downing*300

7. *New Trial as of Right.*—In a suit by the purchaser of real estate in pos-

session under the contract of purchase, to compel the vendor to make a deed therefor to the plaintiff and accept from him a mortgage for unpaid purchase-money, and to set aside as void a deed made by the Auditor of State for said land sold at a sinking fund sale, for having been procured by fraud, and to enjoin the execution of a writ of possession issued by said Auditor, judgment was rendered against the defendants.

Held, that the defendants were entitled to a new trial as of right, under section 601 of the code. *Skeen et ux.*

v. Muir et al.....310

8. *Pleading.—Possession.—Parties.*—

In said action, the complaint showed that said vendor had given a title bond for said real estate to the plaintiff, and that at the same time it was agreed between the parties that the plaintiff should take possession of the land until the time specified in the bond for the conveyance thereof; that the plaintiff had taken and still retained possession of the land under and by virtue of said agreement; that said vendor had received as part payment a certain sum; and that by fraud he had caused the land to be sold from under the plaintiff, and himself held the equitable title under said sale, though another held the legal title, which was purchased with the money of said vendor and was held in trust for him.

Held, that said vendor was a proper party defendant.

Held, also, that the averment of the complaint in reference to the placing of the plaintiff in possession of the land was not an attempt to vary or add to the title bond by parol, nor was it irrelevant matter or surplusage.

Ibid.

9. *Voluntary Conveyance.—Trust.*—

A voluntary conveyance of land, without any consideration, either good or valuable, is valid and binding between the parties thereto and their privies; and parol evidence cannot be given by or between them that the deed of conveyance, absolute on its face, was made upon the agreement of the grantee to hold the land in trust and reconvey it to the grantor or to the grantor's son at a future time, upon the happening of a contingency.

Fouty v. Fouty et al.....433

10. *Fraudulent Representations.—Measure of Damages.*—Where in a sale of an undivided one-half of a tract of land, the vendor falsely and fraudulently represented to the purchaser that there was then upon said land a house of a particular size and description;

Held, that the measure of damages for the lack of such house, in a suit by the purchaser against the vendor for such fraudulent representation, was one-half the amount of the increase there would have been in the value of said land if there had been such a house upon it at the time of the sale, and not merely one-half the amount of money it would then have taken to put such a house on the land. *Sangster v. Prather*.....504

VENUE.

See CRIMINAL LAW, 1, 5, 6.

Change of.—Affidavit.—In an action for a divorce, an affidavit of the defendant, the husband, in support of a motion made by him for a change of venue, stated as the reason for the change, "that he believed he could not have a fair and impartial trial of said cause on account of an undue influence which the plaintiff had over the defendant in the cause."

Held, that the application for a change of venue was properly refused, the affidavit showing no statutory reason. *Sullivan v. Sullivan*.....368

VERDICT.

See INTERROGATORIES, 2, 3; SPECIAL FINDING.

Sealed Verdict.—New Trial.—Where it was agreed by the parties to an action that the jury should be allowed to seal up their verdict and return it to the clerk of the court, and the jury so returned a general verdict for the defendant and answers to interrogatories, some of the interrogatories not being fully answered, and the answers returned not being signed by the foreman, and the court received the verdict in the absence of

the jury and after it had been discharged and the jurors had dispersed; *Held*, that these facts constituted good cause for a new trial on the motion of the plaintiff. *Sage et al. v. Brown*.....464

VESSEL OF U. S.

See MORTGAGE, 1.

VOLUNTARY CONVEYANCE.

See VENDOR AND PURCHASER, 9.

W

WAIVER.

See HIGHWAY, 3; PRACTICE, 8.

WATER CRAFT.

State Courts.—Jurisdiction.—Admiralty.—Our State courts have jurisdiction of an action *in rem* to enforce a lien, under the statute, against a steamboat built in a port of this State, for the price of her engines and boilers furnished to her at said port,—this not being a proceeding in admiralty. *Sinton et al. v. The Steamboat Roberts, &c*.....448

WIFE.

See HUSBAND AND WIFE.

WILL.

Attestation.—It is not necessary to the due execution of a will that the testator should in any manner indicate to the witnesses who attest it that the instrument is the will of the person executing it. *Brown et al. v. McAlister et al*.....375

WITNESS.

Party.—Continuance.—A continuance should not be granted on the ground that a party to the action is absent from the county, and his attorney does not know where he is, and that it appears he is needed as a witness on his side of the case. *Davis v. Luark*.....403

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END OF VOLUME XXXIV.

Esc. J. G.



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